

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1140

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

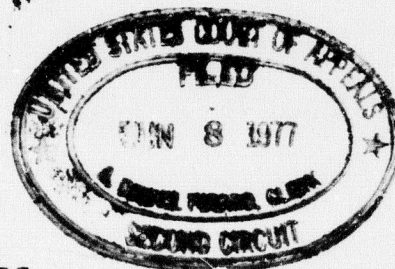
UNITED STATES OF AMERICA,

Appellee,

v.

DAVID STIRLING, JR., WILLIAM G.
STIRLING, HAROLD M. YANOWITCH,
EDWIN SCHULZ and RUBEL L. PHILLIPS,

Defendants-Appellants.



JOINT APPENDIX OF DEFENDANTS-APPELLANTS
DAVID STIRLING, JR., WILLIAM G. STIRLING AND HAROLD M. YANOWITCH

Volume II - Pages A 226 to A 420

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cs6

Barbato - cross

1 A I don't know whether I'd dream of it but --

2 Q It was certainly not within your experience
3 of a transaction as to raw land on which you were going to
4 develop a shopping center that you were going to pay
5 that?
6

7 A Not as a rule. We were going to put a
8 minimum amount of cash and --

9 Q You wanted to put a minimum amount of cash
10 and have as much of a mortgage as you could?

11 A This is what I would like to see if I was on
12 the deal, yes.

13 MR. FELDSHUH: Thank you very much, your Honor.
14 I'm finished.

15 MR. GAYNOR: May I proceed, your Honor?

16 THE COURT: Yes.

17 CROSS EXAMINATION

18 BY MR. GAYNOR:

19 Q Mr. Barbato, you testified that you had the
20 first meeting, is that correct, with Mr. Yanowitch?

21 A Yes, we had a first meeting.

22 Q Pardon me?

23 A Yes, I had a first meeting.

24 Q Where was that first meeting?

25 A That was at the Stirling Homex plant. I think

1 dwa4 Falcone-cross
2 problem.

3 A Well, I don't hear exactly too good, good, but
4 you got to come ahead if you want to talk with me, see,
5 because somebody with a clear voice, you know, is no too
6 clear to me.

7 Q Okay. So you and I have the same trouble.

8 A Yes.

9 Q Unfortunately I'm not retired.

10 Now, Mr. Falcone, isn't it a fact, sir, that
11 there came time after you were retired that you became
12 a real estate salesman?

13 A Not exactly. I just was free-lancer.
14 I bought and I sold, that's about all is to it.

15 Q Right, sir.

16 So that you were pretty -- you knew a good
17 deal about buying and selling real estate, right?

18 A Yes.

19 Q I take it, sir, at this time or during the
20 period after 1961, and down to 1969, you owned some
21 real estate, didn't you?

22 A Well, some.

23 Q Don't be modest, sir. I mean you have
24 been to Acapulco all winter so tell us, you owned quite
25 a bit of real estate, didn't you?

1 cs7 Beckerman - direct

2 that I thought my clients needed protection and that I
3 was suggesting that we prepare a type of agreement which
4 would give them that protection.

5 Q What happened then?

6 A I proceeded to prepare such an agreement.

7 Q What did you do with it?

8 A I submitted it to Mr. Garrity.

9 Q What happened next with respect to that agree-
10 ment?

11 A Shortly thereafter I was advised that the
12 sellers would not sign that agreement.

13 Q Who gave that advice and tell us if anyone
14 else was present, and your best recollection of its
15 substance?

16 A Well, I have a vague recollection that it was
17 either Mr. Garrity or Mr. Yanowitch. I can't state now
18 who. But they indicated they could not sign -- that the
19 sellers could not sign such an agreement that I had
20 prepared.

21 Q Do you recall anything further with respect
22 to that conversation?

23 A I have a vague recollection that they indicated
24 that Stirling would be going public and that they couldn't
25 for other reasons I don't recall sign such a document.

1 csl2 Beckerman - direct

2 A Yes, this was the following day, July 10,
3 1969.

4 Q Please read those notes?

5 A "Conference with Jack Feinglass, 7/10/69 at
6 Daws, 1:00 p.m."

7 Q Is that his place of business?

8 A Yes.

9 "I advised him as to:

10 "1. Zoning and 1000 foot prohibition belt.

11 "2. Unwillingness of seller and parent Stirling
12 to sign indemnity prepared by GB.

13 "3. Re two mortgages and question as to
14 whether payments are to be made during the first
15 year. No guarantee in writing by sellers.

16 "4. Mortgage of B covers other lands.

17 "5. Had no actual knowledge of Gulf option -
18 no guarantee of closing.

19 "6. Showed him mortgage proposal of 302,000 -
20 no release clause.

21 "7. Stockholders agreement term - he indicated
22 that if he went through with the deal had only held
23 Yanowitch's word, not in writing -- told him that
24 I could not recommend -- I told him that I could not
25 recommend proceeding as long as the thousand-foot

hpa

Beckerman-cross

964

1 Q Was no the basis for your preparing that
2
3 and putting it in writing that you knew as a lawyer
4 that an indemnification or guarantee not in writing,
5 signed by the parties to be charged, would not be
6 legally enforceable?

7 A That's right, sir.

8 Q And that was the reason why you wanted it
9 in writing?

10 A Yes, sir.

11 Q 'And didn't you tell your clients, as your
12 notes reveal, that unless it is in writing it is not
13 binding?

14 A I don't know. My notes --

15 Q But during the course of your conversations
16 with them, as their attorney, and as you went to each
17 one and spoke with each one of them, as Government's
18 Exhibit 342 reveals, during the course of the conver-
19 sation don't you have a recollection that you told them
20 in words or substance it should be in writing, other-
21 wise it's not binding?

22 A Yes, sir.

23 Q Now, despite all of that caution and all
24 of that advice that you gave them it is the fact that
25 they told you they are going ahead with the deal any-

hpa

Wynn-direct

980

1 hpa
2 Q Will you tell the ladies and gentlemen
3 of the jury what the magnitude of the contribution that
4 Empire Pipeline's revenues --

5 MR. GAYNOR: Your Honor, I object to that
6 as being leading and suggestive. I suggest the
7 question be what the relationship was and what was
8 done, but not magnitude or percentage and things of
9 that sort.

10 THE COURT: I will allow it.

11 Q What was the magnitude of Stirling-related
12 company contributions to the revenues of Empire Pipeline
13 in those years?

14 A We did, during a three-year period, approxi-
15 mately \$3 million worth of work, two projects located in
16 the Syracuse area.

17 MR. FELDSHUH: Kindly fix the three-
18 year period, please.

19 THE WITNESS: That was, I believe, from
20 1960 to 1969, in that area, '68 or '69.

21 Q What relationship did that \$3 million
22 contribution have to overall Empire revenues in that
23 same period?

24 A In that period it was approximately 40
25 per cent of our annual volume.

1 hpa

Wynn-direct

982

2 and Carmine Grasso.

3 Q Who were those last two gentlemen?

4 A Bill Grago was my partner in Empire
5 Pipeline Corporation, and Mr. Grasso, my attorney.

6 Q What was the discussion on that day?

7 A The discussion was the possibility of us
8 acquiring a piece of commercial property in Clay, New
9 York, a suburb of Syracuse, from the Stirling Enter- .
10 prises.11 Q What was said about that property and the
12 terms under which it might be acquired?13 A David told me that the Stirling Homex
14 Company was disposing of commercial properties at that
15 time due to imagry, that they wanted to be known
16 as housing manufacturers rather than real estate
17 developers, and that we had been working with them in
18 the Syracuse area on many of their projects doing all
19 their land development construction and felt we were
20 the logical ones to acquire this particular piece of
21 property because it was contiguous to other properties
22 we were in the process of starting to develop for
23 them and projects that would be developed in the
24 future.

25 Q How much land was involved and where was

1 hpa Wynn-direct 983
2 it located?

3 A The land was located in the town of Clay, and
4 it was bordered by Soule Road and Route 57, New York
5 State Route 57, and I believe the acreage was about
6 133 acres.

7 Q Was there some state action with regard
8 to some portion of that acreage?

9 MR. GAYNOR: Your Honor, I'm lost. I
10 thought we were at a meeting here in David Stirling's
11 office and people were present and what was said.
12 I don't know who said and what was said.

13 Evidently Mr. MacDonald has shifted to some
14 state action.

15 THE COURT: You are eliciting what was
16 being talked about at the meeting, is that right?

17 MR. MAC DONALD: Yes, sir.

18 MR. GAYNOR: May we know who said
19 what, please?

20 THE COURT: Try to do that.

21 Q Did Mr. David Stirling say anything about
22 the State of New York having some claim with regard
23 to that property?

24 MR. GAYNOR: I object to that as being
25 leading, your Honor. I think the witness should --

hpa

Wynn-direct

984

1 hpa
2 THE COURT: I don't think that's very
3 leading. I will allow it.

4 A Yes, David said that there was a condemna-
5 tion proceeding involving this piece of property by
6 the state of New York for an arterial highway that was
7 going through the property.

8 W Do you recall anything further in that re-
9 gard?

10 A Yes, that that there was an award that they
11 anticipated having within six months from that time
12 of a substantial amount of money.

13 MR. FELDSHUH: Mr. Wynn, could you kindly
14 keep your voice up a little bit.

15 THE WITNESS: Yes, sir.

16 MR. FELDSHUH: Thank you, sir.

17 Q What else was said?

18 A Then we discussed the price of the property
19 and David told me that the price was \$2.1 million.
20 At that time I commented to him I thought that was
21 out of our financial league, we were not equipped to
22 handle an acquisition that large. Up until this time
23 our firm had only been as owner-developers--had only
24 engaged in much smaller projects than that and never
25 had that --

1 hpa Wynn-direct 985

2 MR. GAYNOR: Objection, your Honor.

3 He was asked what was said. Is the witness saying
4 that's what he said to David Stirling or is he giving
5 background information?

6 THE COURT: Were you saying this to Mr.
7 Stirling?

8 THE WITNESS: In essence, yes, sir.

9 THE COURT: Go ahead.

10 A And that I wasn't sure we could handle that
11 magnitude of a project financially.

12 And David then explained to me that he felt
13 that there wouldn't be any substantial tie-up of cash
14 or risk involved in the project because of the sur-
15 rounding development work that was going to occur
16 there and the amount of work that we would be per-
17 forming on their behalf through our construction
18 activities, and that he felt we would be able to carry
19 the project.

20 Q Do you recall anything further in that re-
21 gard?

22 A Well, we discussed then the relative value
23 of the property, and I agreed with him that the \$2.1
24 million did represent the going prime value of that
25 type of property located as it was in that area.

hpa

Wynn-direct

986

1 And then we discussed the fact that whavever
2 award that would be made by the state through the
3 condemnation would be applied to the principal to re-
4 duce the principal amount of the sales price. And
5 at that time I believe it was mentioned that this should
6 be in excess of a million dollars. And with that
7 consideration, if this were to occur, this would place
8 the property in a favorable price level as far as I
9 was concerned.
10

11 We went further then to discuss the
12 terms of the agreement, and at that time David said
13 we would not have to make any principal, we would
14 have to make a down payment of \$210,000, or 10
15 per cent, and we wouldn't be required to pay any
16 principal, any amounts on principal, for five years,
17 or except upon taking of land, and there would be no
18 interest charged. And I think that was basically
19 it.

20 And then I commented at the time that we
21 couldn't come up with \$210,000, to which he replied
22 they could arrange the financing for us and that it
23 would be done and we wouldn't have to come up without
24 any front-end money.
25

T3 pm

1

mcs

Wynn - direct

2

Q Do you recall anything further?

3

A Well, we continued to discuss the various

4

ingredients and we discussed the Fairways East project,

5

which was supposedly getting off the ground at that time;

6

the amount of work that we would be handling there, and

7

some adjacent property that was not a part of this 130

8

some-odd acre parcel but was residential, multi-family

9

residential property that was to the west of that that he

10

felt at a later date, after we got the commercial aspect

11

at Fairways East completed, that we could work out a deal

12

on that property to do multi-family housing.

13

At that point I conferred with Mr. Grago,

14

and this was in the same room - we didn't go into a

15

private area - and based on the fact that we had such a

16

successful relationship with the Stirlings to this point

17

and a profitable relationship, and we considered them to

18

be people of integrity, and we certainly had faith in

19

the Stirling Homex program and project, and it looked

20

like they were really going places, we concluded that this

21

would be a very profitable undertaking for us and that

22

the terms were such that we could go into the transaction.

23

Q What happened next?

24

A At this point David asked us to step over to

25

Mr. Yanowitch's office and give him the details to draw up

cs2

• Wynn - direct

1 the agreement and as I was -- we were leaving his office
2 to go to Mr. Yanowitch, he extended his hand to me and
3 said, "Bud, you won't get hurt by this deal."
4

5 We walked to Mr. Yanowitch's office and he
6 introduced us to him and capsulized the terms of the agree-
7 ment that we had just talked about and asked Mr. Yanowitch
8 to draw an agreement containing those terms.

9 After that we had very little conversation
10 with Mr. Yanowitch. I think the main thing was he asked
11 us what was the name of the company that we would be
12 purchasing the property under and that we were unable to
13 give him an answer at that time because we were going
14 to form a new corporation and we didn't have a name for it,
15 so we told him that we would communicate the name to him
16 as soon as we knew what it was. We left his office, and
17 that was the end of the conversation.

18 Q Did there come a time thereafter when you
19 through your attorney, Mr. Grasso, had occasion to enter
20 into a contract with respect to the matter you have been
21 describing?

22 A Yes.

23 Q Will you identify in Government's Exhibit 56
24 for identification on page 79010 Mr. Grasso's signature
25 there?

1 cs6 Wynn - direct
2 was said?

3 A I believe I was notified by Carmine Grasso,
4 the attorney, that there was an amendment to the agreement.

5 MR. GAYNOR: I object to what he learned from
6 Mr. Grasso in view of his --

7 THE COURT: What do you say to that, Mr.
8 MacDonald?

9 MR. MacDONALD: We won't press for the con-
10 versation itself.

11 Q Following that conversation with Mr. Grasso,
12 did you take some action yourself with respect to
13 executing that amendment?

14 A I discussed the amendment with him and Mr.
15 Grago and we decided that we would accept the amendment
16 and --

17 MR. GAYNOR: I object to what "we decided"
18 and accepted, your Honor, and I think he should testify
19 to what he did.

20 THE COURT: Why don't you tell us what you
21 did.

22 THE WITNESS: I agreed to accept the amendment
23 and had Mr. Grasso sign the amendment and I signed the
24 amendment.

25 Q I place before you Exhibit 56, and I think it

1 cs7
2 is 79020. Can you identify your signature on that page
3 of that exhibit?

4 A Yes, sir, that is my signature.

5 Q I would like you to look behind that on page
6 79023 and ask, first of all, if you can identify --

7 A 79023?

8 Q Yes.

9 -- Mr. Grasso's signature on that page?

10 A Yes.

11 Q Is that an additional three-page amendment to
12 the basic agreement? Is that the signature page of an
13 additional three-page amendment?

14 A It appears to be, yes.

15 Q Did you have some conversation, without telling
16 us what it was, with Mr. Grasso and your partner, Mr.
17 Grago, concerning executing that additional amendment,
18 please, and just yes or no?

19 A Yes.

20 Q After that conversation did you have some
21 conversation with Mr. Stirling?

22 A I don't believe so on this amendment, unless
23 I'm on the wrong amendment. This is the second amend-
24 ment or the first?

25 MR. GAYNOR: I object to that, your Honor.

1 cs8 Wynn - direct

2 That is leading and either he knows or he doesn't know
3 about this particular one that Mr. MacDonald has addressed
4 his attention to.

5 THE COURT: Yes. You'll have to tell us.

6 THE WITNESS: I understood it was the first
7 amendment.

8 THE COURT: Why don't you look at it and
9 see.

10 MR. MacDONALD: Maybe it would be faster if
11 we got the content of the conversation with Mr. Stirling,
12 so that we could learn to which piece of paper it went.

13 THE COURT: No.

14 A Yes, this one in the back is the second
15 amendment.

16 Q Tell us if you had a conversation with Mr.
17 David Stirling and, if so, what hat conversation consisted
18 of and what relationship it bears to the piece of paper
19 in your hand?

20 MR. GAYNOR: May I know which paper he is
21 referring to and holding in his hand, please?

22 THE WITNESS: You want the number of the
23 exhibit?

24 MR. GAYNOR: Yes.

25 THE WITNESS: 56.

1 cs9

Wynn - direct

2 MR. GAYNOR: I know that, but what specific
3 dates, please?

4 THE WITNESS: The specific page --

5 MR. GAYNOR: They are all numbered with a
6 serial number. Can you tell us which one, please?

7 MR. MacDONALD: Maybe, with the Court's
8 consent, we can have the witness relate the conversation
9 and then relate it to the exhibit.

10 THE COURT: What is the signature page?

11 THE WITNESS: The signature page is 79023.

12 MR. GAYNOR: May I have just a point of clari-
13 fication? I don't understand whether the witness said
14 that it was the first amendment or the second amendment.

15 THE COURT: He said second.

16 Is that right?

17 THE WITNESS: Yes.

18 MR. GAYNOR: Thank you.

19 THE COURT: Did you say you had a conversation
20 with Mr. Stirling concerning that amendment?

21 THE WITNESS: Yes, I did.

22 THE COURT: Which Mr. Stirling?

23 THE WITNESS: Mr. David Stirling. This was a
24 telephone conversation.

25 THE COURT: All right.

1 cs10

Wynn - direct

2 Q What did you say?

3 A This \$25,000 payment that was required in the
4 second amendment semi-annually or guaranteed \$50,000 a
5 year on the principal was not in accordance with our
6 original discussions on the purchase of the property, and
7 it concerned me and I called David and I asked him if
8 this had to be a part of the agreement and what the reason
9 was for it, and he said that it had to be but he assured
10 me that there shouldn't be a cash flow problem on our
11 part because the work should be getting off the ground
12 and the work we would be doing for him on the other projects
13 adjacent to this would give us enough cash flow to handle
14 this as well as the fact that we should have the commercial
15 activity developed where we could resell some of the land
16 and get enough surplus cash to handle these principal
17 payments.

18 After that I hung up and I instructed, again
19 instructed Mr. Grasso to go ahead and endorse the second
20 amendment.

21 Q Directing your attention to in or about June
22 1971, did there come a time when you learned something
23 about making the \$25,000 payment required under the amend-
24 ment which you have just referred to?

25 A Yes, about that time Mr. Grago told me that --

cs17

Wynn - cross

1
2 right?

3 A Right.

4 Q And the discussion centered upon your acquiring
5 this piece of property on Soule Road at the junction of
6 New York State Routes 57 and 31 in Clay, is it?

7 A Yes.

8 Q How did you come to get to Homex' office about
9 that?

10 A It was first brought to my attention by Carl
11 Wren, who was the man that we dealt with in the Syracuse
12 area mostly on the projects we were working on there.
13 It came about through a conversation that he and I had
14 with a Mr. Robert Congel, who was a commercial --

15 Q May I stop you there? I don't want to
16 preclude you. I want to trace the history, if I can,
17 of that. May I?

18 A Yes.

19 Q Isn't it a fact that Mr. Wren was doing all
20 the business activities in that area for Stirling Homex?

21 A Yes, sir.

22 Q And he was an employee of Stirling Homex,
23 wasn't he?

24 A Yes, sir.

25 Q Was he a friend of yours?

csl8

Wynn - cross

1

2

A Yes.

3

Q How long?

4

A I think since 1965.

5

Q And that was before Homex, wasn't it?

6

A That was before Homex, yes.

7

Q You were dealing with Mr. Wren, who was

8

employed by Homex? As a matter of fact, Mr. Wren had

9

had some co-venture dealings with you, had he not?

10

A No.

11

Q None whatsoever?

12

A No.

13

Q Did Mr. Wren invite you along to meet Mr.

14

Congel?

15

A No, it was at my suggestion that we went to

16

see Mr. Congel. We weren't seeing him on this particular

17

land. It came up in the conversation. We were going

18

to see him if we could lease his property, some property

19

he had in the Town of Clay, for the purpose of storing

20

modules, and during the course of the conversation he

21

asked Mr. Wren about this property on Route 57 and 31.

22

Q You learned then, and then a conversation took

23

place, did it not?

24

A Yes.

25

Q And you were there and heard of the conversa-

csl9

Wynn - cross

tion between Messrs. Wren and Congel; isn't that correct?

A Yes, sir.

Q Is it a fair statement that then you learned that Mr. Congel had an interest in the purchasing of the property that you testified to?

A Yes.

Q Will you tell the jury and the court who Mr. Congel is?

A Mr. Congel is a real estate developer primarily of shopping centers in the Central New York area.

Q Would you say that he was very successful?

A Yes, sir, he is.

Q Would you say that he was very wealthy?

A Yes, sir.

Q And he was the man now who evidenced an interest in this property belonging to Homex; correct?

A Yes, sir.

Q Is it not a fact that as a result of your learning of Mr. Congel's interest that you became interested in that property?

A Not immediately. That was an ingredient, yes.

Q The bee that went in your bonnet was the fact that Mr. Congel was interested so therefore it must

1 cs20 Wynn - cross

2 be a pretty good deal and therefore you wanted to and
3 became interested?

4 A That is fair to say.

5 Q So that the origination of the discussions
6 pertaining to thsi land started with you and not David
7 Stirling; isn't that true?

8 A Yes, I suppose so.

9 Q It was thereafter in pursuit of your interest
10 in this piece of property that you went to see, according
11 to your testimony, David Stirling; is that true?

12 A In my interest in pursuant of the property?

13 Q If you became interested, as you just told us
14 you did, you initiated the discussion with David Stirling,
15 didn't you?

16 A No, I did not. I did not initiated the
17 meeting with David Stirling.

18 Q but you thought of purchasing or negotiating
19 the purchase so that the birth of the negotiations which
20 gave birth to this transaction of land which you testified
21 to started with you you told us; is that correct?

22 A It started with a conversation with Mr.
23 Congel, yes.

24 Q And you just told us -- I don't want to be
25 repetitive -- that as a result of Mr. Congel's interest

cs21

Wynn - cross

1 it came into your head that it must be a good deal and
2 therefore you were interested? Perfectly natural, and
3 that is what happened, didn't it?
4

5 A Yes, sir.

6 Q Therefore in pursuing your interest in the
7 property you went to confer with Mr. Stirling; isn't
8 that true?

9 A Yes, sir.

10 Q Now, tell us a little bit about this land and
11 why you were so interested in it?

12 A The land was located in what at that time, at
13 least, was a prime location for a major shopping center.
14 Studies had been made and plans had been drawn for this
15 purpose, and at the time there was a very definite need
16 geographically in that part of the country for a major
17 shopping center, and this one was about ready to go.

2 18 Q And isn't it a fact, sir, that there was a
19 big highway that went right through there and that Route
20 57 became a major New York State central artery?

21 A Yes, sir.

22 Q And that property was located in or about a
23 ramp, an entrance and exit ramp of that major arterial
24 highway that went through there?

25 A That is true.

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c323

Wynn - cross

acres that were condemned by the State of New York representing 28 per cent of the total?

A The value placed by whom?

Q By the State of New York. What award was being mentioned, how much?

A The State was not at that point -- I don't believe the State was mentioning an amount of money. I know that the suit was for, I think it was, around 2 million dollars.

Q You did tell us, did you not, if I can remember your testimony, that you talked about the value of the property in this discussion?

A Yes, sir.

Q And that you discussed too and you said that it would be in a condemnation award in excess of \$1 million, which would be used to reduce the principal total cost of 2 million 1 of the property; do you remember that?

A Yes, sir.

Q Was that true?

A It was an anticipated award. It wasn't a definite amount of money.

THE COURT: Where did you get that figure from?

THE WITNESS: That was told to me by Mr.

hpa4'

Wynn-cross

1015

1 hpa4'

2 A Yes, sir.

3 Q Holding it in a corporate name, correct?

4 A Yes, sir.

5 Q And thereby having its stockholders, namely,

6 you, Mr. Grago and Mr. Grasso, insulated against any

7 possible liability personally, isn't that true?

8 A That's true.

9 Q Have you heard that such a corporation is

10 commonly called a shell corporation?

11 A Yes, sir.

12 Q And there is nothing unusual or extraordinary

13 about that, isn't that right?

14 A Not to my knowledge.

15 Q And at the time that you took over this

16 piece of property it was actually commercially zoned,

17 wasn't it?

18 A Yes, sir.

19 Q In other words, the zoning was all set

20 for you to go ahead; you didn't have to make any

21 application to a zoning board to change the zoning law

22 to do what you wanted to do with that piece of property,

23 is that right?

24 A You just had to get approval for the type

25 of buildings. No zoning changes, yes, sir.

1 hpa3 Grago-direct

2 business with them and it amounted sometimes to as much
3 as 25, 30, 40 per cent in a given year if they had a
4 major project in that year.

5 Q In calendar 1970 would you tell the members
6 of the jury, please, what proportion of overall revenues
7 Stirling-related revenues consisted of?

8 A In 1970 it was not a great deal. I can't
9 tell you the exact proportion but it was not a great
10 deal.

11 Q Directing your attention to in or about
12 mid-December, 1970, did you have occasion to attend a
13 meeting with David Stirling with respect to a business
14 transaction?

15 A Yes, I did.

16 Q Will you tell the members of the jury where
17 that meeting occurred, who was present and what was said,
18 please?

19 A On December 15th, I think it was, of 1970,
20 Bud Wynn, Carmine Grasso and myself drove to Avon, New
21 York, to Stirling Homex's office. We met with David
22 Stirling. The purpose of the meeting was to dis-
23 cuss a parcel of land in Clay, New York, at the inter-
24 section of Route 57 and 31.

25 The meeting took place in David Stirling's

1 hpa4 Grago-direct

2 office. David Stirling was there, Carmine was there,
3 Bud was there and I was there.

4 Q What was said?

5 A I can't give you, you know, quotations, but
6 I can give you the substance of the meeting.

7 MR. FELDSHUH: Could we have the identi-
8 fication? What was the other gentleman's name?

9 THE WITNESS: Carmine Grasso, our attor-
10 ney, Bud Wynn, my partner.

11 MR. FELDSHUH: Bud is Mr. Wynn?

12 THE WITNESS: Yes, sir.

13 MR. FELDSUH: Thank you.

14 THE WITNESS: You are welcome, sir.

15 A The purpose of the meeting was to discuss
16 that property. David Stirling explained to us that
17 their property was for sale and he would like us to
18 purchase it. He discussed that the price of the
19 property would be \$2.1 million, that it would cover
20 also -- that incorporated in the deal would be the
21 condemnation rates that were pursued at that time,
22 \$2.106 million, or some number close to that, and it
23 was anticipated that suit would be a very successful
24 suit and that the net would thereby be lowered
25 considerably and would make it a very attractive land

1 hpa5 Grago-direct
2 deal.

3 Bud pointed out at that meeting we were not
4 financially capable --

5 MR. GAYNOR: Your Honor, I object to Mr.
6 Graso testifying to what Bud said. He was on the stand
7 and testified extensively to what was said.

8 THE COURT: I will allow it.

9 A Bud said that we were not financially
10 capable of handling a \$2 million deal, we weren't that
11 financially strong; and David said that he could
12 arrange for the financing and that it would be a simple
13 contract, and -- let me try and get this right --
14 that the --

15 MR. GAYNOR: I think the witness said
16 something which I didn't hear.

17 THE WITNESS: I said "let me get it right."

18 MR. GAYNOR: Thank you.

19 A And David replied to Bud that we were
20 logical people for the deal and that he would make the
21 financial arrangements work, that it would require a
22 10 per cent down payment, but he could arrange all of
23 the banking necessary for that, that we didn't have to
24 concern ourselves with that.

25 I believe at some point during the conversa-

1 hpa6

Grago-direct

2 tion I asked about, your know, what guarantee we might
3 have that there wouldn't be a problem for us, and
4 David said --

5 MR. GAYNOR: I move to strike anything
6 he thinks he did, your Honor.

7 THE COURT: Are you giving us the best
8 recollection?

9 THE WITNESS: Yes, sir, that's all I can
10 do. I can't remember the exact words I used. I'm
11 trying to be as honest as I know how to be.

12 THE COURT: All right.

13 A David said there could be no corporate
14 guarantees but he would personally guarantee that we
15 would not be hurt, and we shook hands on that. We
16 had worked with David Stirling before and we believed
17 that's the way it would work.

18 Q What happened then?

19 A We then stopped in to Mr. Yanowitch's office
20 for a couple of minutes and shook hands, that sort
21 of pleasantry, and talked about the paper getting
22 worked on. And I think it was on that trip also that
23 we went over to Mr. Davis. I can't be sure it was
24 at that time but I think we also went over and met
25 Mr. Rubin Davis, who took care of the paper work, drawing

2 Q That was the 57-31 Corporation?

3 A Yes.

4 Subsequent to that payment being made to the
5 bank, we were contacted again and again, I believe, it
6 was either Bud was called or I was called by Carl or
7 Bud was called -- I'm not positive about how the communica-
8 tion came to me.

9 MR. GAYNOR: May we have an identification
10 who Carl is, your Honor?

11 THE WITNESS: Carl Wren.

12 Q Mr. Wren was associated with Stirling Homex?

13 A Yes, from the time I began doing business with
14 him and was a Syracuse contact and actually lived in
15 Syracuse a good deal of the time that we were working
16 for the Stirlings.

17 And, we were told that the money had to be
18 put back into the bank because the arrangement was that
19 that money was there as a protective covenant toward the
20 interest payments that had to be made. And at that time
21 we said well, you know, we don't have \$25,000 laying around,
22 we explained this, up front, that we didn't have money
23 for carrying, et cetera, et cetera. During that same
24 period of time we were doing work for Stirling Homex on
25 the modular staging and I discussed with Carl Wren the

ps2

Grago - direct

possibility of paying an invoice, in a little different fashion than we normally had billed whereby Empire had done all the billing to Stirling Homex in order to accommodate the situation, to get the money into a corporation where the ownerships were equal.

Carmen, Bud and Bill, Carmen Grasso, Bud Wynn and Bill Grago were also common owners in a leading company which furnished the equipment to Empire Line. Instead of billing the equipment through Empire Pipeline and going through the normal billing procedures, it was agreed we would bill Stirling Homex directly for that equipment during that period of time and if they would pay their bill promptly, we would immediately take those funds and give them over to 57-31's bank account, which we did.

Q What was the name of that leasing company?

A Leasing Equipment Limited.

Q I show you Government's 942 in evidence and direct your attention to the third page thereof and ask you if you recognize that page as being Lease Equipment's invoice to Homex or Homex' subsidiary for \$25,000 and some hundred.

A Yes, sir.

Q Did you author that document and cause it to be typed and given to Homex as you described?

1 ps7

Grago - cross

2 Q Did you take any accounting courses?

3 A Yes, sir.

4 Q Books and records?

5 A Yes, sir.

6 Q Promissory notes?

7 A Yes, sir.

8 Q Contracts?

9 A Yes, sir.

10 Q Personal endorsements?

11 A Yes, sir.

12 Q And mortgages?

13 A To some degree.

14 Q Mr. Wynn is your partner, isn't he?

15 A Yes, sir.

16 Q Did you come down from Syracuse with Mr. Wynn?

17 A I did.

18 Q Did you spend last evening with him?

19 A I did.

20 Q Did you discuss his testimony with him?

21 A I did.

22 Q What did he tell you?

23 A Well, he talked to Mr. Grasso on the telephone

24 and I heard his end of the conversation.

25 Q I asked you if Mr. Wynn discussed his testimony

ps8

Grago - cross

1049

1 with you last night.

2
3 A He told me the procedures that were gone
4 through and what it was like to -- our first time in a
5 courtroom, my first time in a courtroom as a witness and
6 I was interested in how it worked and he told me about that
7 and I was interested in the substance of what questions
8 were asked, et cetera.

9 Q Did you ask him what questions were asked of
10 him?

11 A I asked about specific areas, yes.

12 Q What area did you ask him about?

13 A I asked what you asked him on cross-examination
14 and he mentioned, you know, a couple of things. I had
15 heard most of it from the conversation with Carmen so there
16 was little to talk about after being exposed to the tele-
17 phone conversation.

18 Q You heard most of what I asked Mr. Wynn on
19 cross-examination from Carmen?

20 A From listening to him talk to Carmen on the
21 telephone.

22 Q Did you speak to Carmen?

23 A Yes.

24 Q Did Mr. Grasso tell you what I asked Mr. Wynn
25 on cross-examination?

1 ps9

Grago - cross

2 A No. Mr. Wynn was talking to him and I heard
3 Mr. Wynn talking.

4 Q And Mr. Wynn told him what I had asked him on
5 cross-examination. And you were present, right?

6 A Yes.

7 Q Did you stay with Mr. Wynn last night in the
8 city?

9 A I did.

10 Q Same hotel?

11 A Same room.

12 Q And you discussed generally what he testified
13 to yesterday?

14 A Yes.

15 Q Did you know that Mr. Wynn never said there
16 was a personal guarantee by David Stirling yesterday?

17 MR. MacDONALD: I object to the question.
18 It doesn't recount faithfully the examination.

19 THE COURT: Whether it does or not, I sustain
20 the objection. I don't want one witness examined about
21 what another witness did or did not testify to. Just
22 ask him questions.

23 Q Isn't it a fact, Mr. Grago, that Mr. Wynn was
24 the one who really carried on the conversation and
25 negotiation with David Stirling and Mr. Wren? Isn't that

1 ps10 Grago - cross

2 a fact?

3 A Yes.

4 Q Your role was relatively a minor one, isn't
5 that true?

6 A That's true.

7 Q And Mr. Wynn would be able to give us the best
8 account of what transpired, isn't that true?

9 A Well, I was there.

10 Q But Mr. Wynn was the one who was speaking, was
11 he not?

12 A That's true.

13 Q And therefore Mr. Wynn would know from direct
14 knowledge of his own mouth what transpired, correct?

15 A Yes.

16 Q Mr. Grago, in this construction business, you
17 testified that there was considerable work done between
18 you -- when I say "you", at this moment I mean your
19 company -- with Stirling brothers operating company,
20 isn't that true?

21 A Yes, sir.

22 Q They were a good customer?

23 A Excellent.

24 Q You performed the work for them?

25 A Yes, sir.

psll

Grago - cross

- 1
2 Q You did it in a workmanlike fashion?
3 A Yes, sir.
4 Q Always honored your commitments?
5 A Yes, sir.
6 Q And you were always paid by Stirling for the
7 work you had done?
8 A Absolutely.
9 Q No problem about that?
10 A No, sir.
11 Q And you did have, you testified, 25 to 40 per
12 cent of your income coming from Stirling brothers?
13 A In some years that was the case.
14 Q Now, you know it is not unusual for a pipe
15 contracting company or a construction company to have a
16 particular good customer, isn't that true?
17 A If you're doing land development work that's
18 true.
19 Q So there was nothing unusual about that
20 relationship, was there?
21 A No.
22 Q Now, also you ran the books of Empire, didn't
23 you?
24 A Yes, sir.
25 Q You knew about billing procedures?

ps12

Grago - cross

1 A Yes, sir.

2 Q You knew about ledgers, journals and accounts
3 receivables and accounts payable?
4

5 A Yes, sir..

6 Q When you decided that you were going to have
7 57-31 Corporation bill Homex for \$25,000 instead of Lease
8 Equipment Company -- do you remember you testified to
9 that?

10 A No. What I said was our normal procedure
11 was for Lease Equipment, which was a company that rents
12 equipment to Empire Pipeline, bill Empire Pipeline for
13 equipment use and Empire Pipeline do its billing and
14 Empire Pipeline normally bills Sterling Homex for men,
15 et cetera, in a single invoice. That was our ordinary
16 procedure but that on the occasion of the \$25,000 demand
17 that was made upon us, what we did was deviate from that
18 to the extent that we had Lease Equipment Limited bill
19 directly for equipment use only for Stirling Homex and
20 Stirling Homex paid that money over to Lease Equipment
21 Limited where the owner ships and relationships, business
22 relationships were the same as were in the 57-31 Develop-
23 ment Corporation and we took the money with the understand-
24 ing that if they would pay that currently that we would
25 use that money to replenish the 57-31 account.

T3A am 1

dws

Grago - cross

2 Q Was there anything evil in that?

3 A No, I thought it was very good accounting.

4 Q Were you concealing anything?

5 A No.

6 Q So that when you deviated as you said from your
7 normal procedure you weren't trying to hide anything, were
8 you?

9 A No, what we were trying to do was to, you
10 know --

11 Q You were trying to shortcut the full scale
12 accounting procedures in going through another entity,
13 isn't that a fact?

14 A Well, there was more than that too. You
15 had different relationship with the different companies.
16 So you didn't want to cheat anybody, so you had to do it
17 over --

18 Q I asked you that. Were you trying to cheat
19 or conceal or do anything like that?

20 A No.

21 Q As a matter of fact the owners of Lease Equip.
22 and 57-31 were the same, weren't they?

23 A Yes.

24 Q So instead of making an additional set of
25 checks and an additional invoice, you just shortcutted

ws2

that and took it directly, correct?

A Yes.

Q Nothing surreptitious. You know what I mean by surreptitious?

A Yes.

Q Nothing surreptitious about that?

A Nothing surreptitious in that transaction.

Q Mr. Grago, let's back a moment. The price of this land of 2.1 million was a fair price, wasn't it?

A We thought the deal could work and to say it's a fair price, given the belief that the condemnation proceeding was going to you know, yield the reasonable settlement, yes.

Q What I'm trying to get at is that there were factors which you took into consideration in agreeing to a 2.1 million price, correct?

A That's correct.

Q The location of the land?

A Yes.

Q At the intersection of Routes 57-31?

A Yes.

Q That Interstate 481, a super highway was going right through there?

A Yes.

ws9

Grago - cross

document being received in evidence.

MR. GAYNOR: Your Honor, I'll put it in when I wish to, please, if I may.

THE COURT: But he's actually trying to help you, Mr. Gaynor.

MR. GAYNOR: Yes, I know.

THE COURT: All right. Then you may not have the witness read from a document not in evidence. Take the document away, please.

MR. GAYNOR: I'll offer it, your Honor, if I may.

THE COURT: Any objection?

MR. MacDONALD: No, sir.

THE COURT: It's received.

Now you may have it and the witness will read it.

(Government's Exhibit 98 was received in evidence.)

MR. GAYNOR: Your Honor, if I may it's marked Government's Exhibit 98. However, I have offered it in evidence on behalf of my clients. Should it be re-marked or may it be stipulated?

THE COURT: I don't think anybody will really care. It's in evidence.

xx

1 es10

Grago - cross

2 MR. GAYNOR: And put it in evidence by the
3 defendants David and William Stirling.

4 THE COURT: The record will show that you put
5 it in evidence.

6 MR. GAYNOR: Thank you, your Honor.

7 Q Excuse me, Mr. Grago, I just want to help you
8 to get to the right page, if I may.

9 Would you tell the jury please what the net
10 worth on October 15, 1970 of Mr. Grasso your attorney and
11 president of 57-31 Development Corporation was?

12 A \$337,200.92.

13 Q If you would please look, continuing with the
14 same exhibit, and tell us what the net worth of Harold
15 Wynn, referred to you as Bud Wynn, right?

16 A Yes.

17 Q Your partner?

18 A Yes.

19 Q And a member of this corporation, stockholder?

20 A Yes, sir.

21 Q As of November 30, 1970 would you tell the
22 jury what the net worth of Mr. Wynn was?

23 A \$416,303.20.

24 Q Therefore if you would just take that pencil
25 and perhaps maybe we can just total it right on the back,

1 esll Grago - cross

2 can we?

3 Would you write -- why don't you do it right
4 here if you don't mind.

5 \$416,303. Shall we leave off the cents?

6 A Yes, let's.

7 Q Fine. If you will just put Mr. Wynn, okay.

8 Put Mr. Grasso. I'll read it to you so you
9 can write it if it's all right with you.

10 \$337,202.

11 Now we'll take yourself, \$228, 214.

12 Would you total them up, please?

13 A \$981,719.

14 Q So that the total net worth of the three of
15 you immediately prior to your entering into the contract
16 which is December 23rd, 1980 and is Government's
17 Exhibit 56 in evidence, immediately preceding that the
18 three of you had an net worth of \$981,719, is that
19 correct?

20 A Yes, sir.

21 Q Isn't it also a fact that you were only
22 required to effectuate this contract to put down on the
23 10 percent factor \$210,000?

24 A Yes, sir.

25 Q So that the three of you could have swung it

dwa7

Grago-cross

Q Well, all right, tell me.

A I don't know what you are saying.

57-31 never billed Kabeth or Homex. Lease Equipment, Ltd. did bill them because they had equipment, put the equipment on the site and billed for that equipment.

Okay. Now, I don't know where you are headed sir, but that's, you know, the way that that happened.

Q What I'm trying to ask you is evidently inarticulate, for which I apologize.

Let me try to get it this way then: The \$25,000 payment from Homex for which it was billed -- right?

A Yes.

Q -- was a bona fide payment, wasn't it?

A Yes.

Q It was a payment made for work done by Lease Equipment to the corporation, right?

A Yes.

Q Namely, for the --

A Equipment record.

Q Namely, for using and renting the equipment of one of your corporations?

1 dwa8 Grago-cross

2 A Yes.

3 Q There was nothing surreptitious or devious
4 about that, was there?

5 A No.

6 Q And wasn't it a fact to say that it was
7 in effect saying "We'll pay the interest but give us
8 the money you owe us, legitimately owe us," isn't
9 that a fact?

10 A Yes.

11 MR. GAYNOR: May I have Government's
12 Exhibit 56, please?

13 Q This Government's Exhibit 56, Mr. Grago ,
14 is the contract that 57-31, your corporation, entered
15 into with Kabeth, which is the subsidiary of Homex,
16 for the purchase of this property we have been talking
17 about, correct?

18 A Yes, sir.

19 Q It also contains two amendments, doesn't
20 it?

21 A Yes, sir.

22 Q At all times you consulted with Mr. Grasso,
23 did you not, about this contract?

24 A Yes, sir.

25 Q You have ever since that time had Mr. Grasso

1 hpa2 Grago-cross

2 primary emphasis, reason for Homex divesting itself
3 of this piece of property?

4 A That was the exact reason David Stirling
5 gave us, yes.

6 MR. GAYNOR: I have no further questions
7 at this time, your Honor.

8 MR. FELDSHUH: I have one or two, your
9 Honor.

10 CROSS EXAMINATION

11 BY MR. FELDSHUH:

12 Q During the course of your direct testimony
13 you used, in response to Mr. MacDonald's question,
14 that you executed an endorsement; do you remember so
15 testifying, sir?

16 A Yes.

17 Q What instrument were you endorsing? You,
18 as a person familiar with business affairs, know what
19 an endorsement is, don't you?

20 A It was a guarantee on a corporate note.

21 Q It was a guarantee on a corporate note?

22 A Yes.

23 Q I now refer you to Government's Exhibit
24 57 in evidence, and looking at the reverse side of
25 it, that's the guarantee?

1 hpa3 Grago-cross

2 A Yes.

3 Q And you got this note after you had sent
4 certain papers to Mr. Marshall at the Central Trust Company,
5 is that right?

6 A I never sent papers to Mr. Marshall at
7 Central Trust. They were forwarded by others.

8 Q You signed certain papers that went into
9 Central Trust, didn't you?

10 A They ended up in Central Trust, but I don't
11 believe I ever sent them directly there. I know I didn't.
12 I don't recall ever sending them there.

13 Q I take it, sir, that when you signed Govern-
14 ment's Exhibit 63 you looked at it, did you not?

15 A Yes.

16 Q Having looked at it you knew at that time
17 as you were signing it that it was an instrument on
18 the stationery and form of Central Trust Company, right?

19 A Yes.

20 Q So that as of the date or as of the time
21 of your signing this instrument you knew at that moment
22 that you were going to be personally obligated for
23 this loan, didn't you?

24 A No, I didn't.

25 Q You mean, sir --

1 hpa10

Frank-direct

2 Q I show you government's Exhibit 99 for
3 identification. Is that the document which relates
4 to the immunity and assurances you have just described
5 to the jury.

6 A Yes.

7 Q I would like to direct your attention,
8 Mr. Frank, to in or about the month of February , 1971
9 and ask you if in that time frame you had occasion
10 to have a conversation with Mr. Cesare Falcone about
11 a business transaction he had with Stirling Homex?

12 A Yes.

13 Q Would you tell the jury where that conversa-
14 tion was, who was present and what it was that Mr.
15 Falcone said and what you said to him.

16 MR. FELDSHUTZ: Objection. This is
17 1971. As the witness testified, he was no longer
18 a partner of Mr. Yanowitch and I take it Mr. Yanowitch
19 was not present at this conversation.

20 Q Mr. Yanowitch was not present?

21 A Mr. Yanowitch was not present at that conver-
22 sation.

23 MR. MAC DONALD: It's information in re-
24 spect of the transaction that is being described. It
25 is clear that Mr. Yanowitch was present. In that sense

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Frank-direct

he was not listening to the report. Further testimony will relate how much of the substance was related to Mr. Yanowitch directly.

MR. FELDSHUB: At this time, if your Honor please, I don't see that that is a proper foundation for getting in hearsay statements.

THE COURT: It's an effort to show or represent that there will be a connection. Is that what you are saying?

MR. MAC DONALD: Yes, sir.

THE COURT: And you are representing hereafter you are going to show through this witness or otherwise that this conversation was communicated to Mr. Yanowitch, or parts of it?

MR. MAC DONALD: Yes, sir.

THE COURT: I will allow it subject to motion to strike.

A Somewhere in about February 15, 1971 Mr. Falcone appeared in my office. I'm not sure on that particular day he intended to see me, but when I walked in he asked to talk with me. And we passed some pleasantries in my office, and then he told me that he was very unhappy with a deal that he had gotten into with some Syracuse land, that Harold Yanowitch

1 hpal2

Frank-direct

2 had put it together about a year and a half before,
3 and that they were now requiring -- there were some
4 mortgage payments to be made or money had to come up
5 or had to be brought forth and that neither Mr. Falcone
6 or the partners that there were in the deal wanted
7 to come up with any more money, and Mr. Falcone said
8 that Harold told him he would be out of the property
9 in a year and would I please call Harold and tell him
10 please do something so that he would in fact be out
11 of the deal.

12 Q What happened next following that conversa-
13 tion that you have just described?

14 A Well, I didn't call Harold right then
15 because I was about to leave on a vacation and I was
16 very pressed. So I went away on a vacation a day
17 or two later.

18 Q Where did you go?

19 A I went to Acapulco, Mexico.

20 Q I hand you Government's Exhibit 100
21 in evidence, as well as Government's Exhibit 101
22 for identification.

23 Can you tell us if you recognize the hand-
24 writing on 101, Mr. Frank?

25 A Yes, that is my handwriting.

ps5

Frank - direct

called who.

MR. FELDSHUH: May we have the time when he got back?

THE WITNESS: I would have gotten back on probably March 6, which was Sunday, and I had a telephone conversation with Harold either on Monday the 7th or Tuesday the 8th.

Q What do you recall saying to him and he saying to you during that conversation?

A Well, I opened up the conversation by saying to Harold that Cesare had been in to see me, had been after me to call him and tell him to please do something about having him out of the Syracuse property, that it was long past a year and Cesare said he was supposed to be out in a year, and that he was not going to come Up with any money or none of the other partners were going to come up with any money and asked me if I would please call you, Harold, and tell you these things and see if you can do something about it.

Q What did he say?

A Well Harold got kind of mad at that.

MR. FELDSHUH: What did he say, sir, please.

A He said he had told Cesare that he would try to get them out in a year but that he has been terribly

ps6

Frank - direct

1 tied up because the high-rise project was six to eight
2 months behind schedule and he had been devoting all his
3 time to that, and he hasn't been able to devote any time
4 to anything else. And, he said that Cesare and the
5 other men in the deal knew about the difficulties with the
6 high-rise project, and he couldn't understand why they
7 were behaving that way, what they were doing, walking away
8 from the deal.
9

10 He said in view of the relationship he had had
11 with them over the years, he considered this a real breach
12 of faith on their part, behaving this way. He went on
13 to say that this wasn't the worst of the pressures that he
14 was under. He said the Stirlings were really criticizing
15 him because here he had put together a deal with respect-
16 able businessmen a year, a year and a half ago and it was
17 falling apart, and he was under terrible pressure from
18 his old friends and, you know, Mr. Falcone, et cetera,
19 on one side and his two business associates on the other
20 side, and I can just tell you that the tone of his voice
21 and everything about it, he sounded terrible, you know,
22 bad.

23 Q What else was said?

24 A Because he sounded so bad or sounded the way
25 he did --

A 272

ps8

Frank - direct

property."

He went on to explain it was worth 35 to \$40,000 an acre, that it would only take about \$40,000 to buy the whole parcel, that an acre had been sold a year or so ago for \$80,000 or something like that, that it was a very valuable piece of land and that it was a good deal. I mean, he just kept talking about how good a piece of property it was.

I don't believe I said anything further and he came back and said: "We think the property is so good that we will come back in six months or so and do a high-rise project as a joint venture with you and John; I know I can get a hundred percent financing so you'll have the value of the land as your share of the joint venture and it will be a good annuity for you."

Q What did you say?

A I said: "Well, Harold, I don't know, I'm not sure."

He came back and said: "You don't need all of the land for a high-rise project so if you want to sell off two or three acres right away, do it and get your money out that way, and if you need releases of mortgages of the property, I'll take care of it."

Q What does to a lawyer release the mortgage,

ps9

Frank - direct

and the sale of two or three acres mean? What did it mean to you when he told you that?

A It means in technical legal language that the lien of the mortgage would be removed from the records by a document as regards the two or three acres that you wanted to sell. In layman's language it means you free up two or three acres for sale and get the money for them.

Q What if anything had you been told about the terms of the mortgage requiring Homex to give such a release?

A I don't believe there was any conversation about that. I don't know of any of the conversations about terms.

Q What was said next in the course of the conversation?

A I said to Harold that John and I hadn't had such a good year the year before and that we just didn't have any money to invest in a piece of real property, and Harold said, "Well, this is a leverage deal, you should borrow the money for this kind of a deal", and then he went to suggest how we should go about borrowing the money.

Q What was the suggestion?

1 ps10

Frank - direct

2 A Well, first he said, "You have a large line
3 of credit at Marine Midland" and he knew that from when he
4 was with us before. In fact, we had a large line of
5 credit at Marine Midland.

6 And, I said to him "We can't borrow from
7 Marine Midland because I need our line of credit to operated
8 the law partnership."

9 He said, "Well, then go to Central Trust,
10 you're equally well known at Central Trust and that of
11 course is Stirling's bank and tell them Stirling has a
12 mortgage on the property and they're going to come back
13 on the property in six months and do a joint venture high-
14 rise and I'n sure you won't have any trouble borrowing the
15 money there either."

16 He said, "If anybody at Central wants confirm-
17 ation that we have the mortgage or that we're going to come
18 back and do a high-rise with you, just have them call.

19 Q What did you say to that?

20 A I said, "Harold, even if we borrow the money
21 to go into the deal, they're going to want interest
22 payments, regular interest payments and probably regular
23 principal payments and John and I are just not in a
24 position to do that."

25 And, Harold said, "Don't worry about that,

1 psll Frank - direct

2 we're going to be sending you so much legal business
3 that this investment will never be a burden on you and
4 John."

5 Then he went back into the personal favor,
6 personal relationship, you know, "s really want you to do
7 this for me, it will help me out, we've been friends for
8 such a long time and I know you and John would like to
9 help me", and then, again, it's a good piece of property.

10 I said to him, "Harold, I've really got to
11 talk this over with John", and he said, "Yes, you do that."

12 He said, "I'm going to send you down this
13 brochure which I have on the property which will tell you
14 all about it, tell you all of the benefits and good things
15 about the property to help you make a decision, and I
16 know you'll do this for me."

17 Q Anything else?

18 A Not that I can remember.

19 Q You referred in the course of that description
20 to a \$40,000 sum that was needed. Do you recall that
21 reference?

22 A Yes.

23 Q Do you remember if there was any further
24 discussion in respect of the components of that amount.

25 What was the \$40,000 sum related to?

1 ps12 Frank - direct

2 A I don't believe there was any breakdown of
3 the \$40,000. It was just a figure that Harold quoted to
4 me as what would be necessary to buy the property.

5 Q Did there come a time thereafter when you had
6 some additional discussion in respect of the sum or sums
7 necessary to buy the property?

8 A Well, first I did in fact have a discussion
9 with my partner, and we did in fact decide to go ahead
10 and do this deal, and I asked my partner to contact Harold
11 or somebody at Stirling, and the attorney for Mr. Falcone
12 and tell them we would go ahead and buy the property, and
13 I asked him if he would take care of the mechanics of,
14 you know, doing the closing and he said he would and I
15 left the deal, so to speak, at that point.

16 Q Let me show you Government's Exhibit 102 for
17 identification.

18 Do you recognize the handwriting on that piece
19 of paper?

20 A Yes.

21 Q Who is that?

22 A That's my partner's handw.

23 Q Mr. Garrity?

24 A Mr. Garrity.

25 Q Are you able to tell the members of the jury

1 ps13 Frank - direct

2 if you and Mr. Garrity discussed that exhibit, 102 for
3 identification?

4 A Yes.

5 Q Will you tell us what the discussion was?

6 A Mr. Garrity did in fact get in touch with the
7 attorney for the sellers and got the various components or
8 the items necessary to make up the purchase price of the
9 property and he made notes of them as to what they totaled
10 and then came into my office with the note in his hand
11 and he said to me that the total required to close the
12 deal would be \$41,400, not \$40,000, and I suggested at that
13 point to him that we borrow \$45,000 so that we would have
14 a little extra money in the real estate kitty or in the
15 purchase money kitty to take care of any additional
16 expenses that might come up at the closing.

17 We agreed that that's what we would do and I
18 told Mr. Garrity when the deal was ready to close to let
19 me know and we would go over to the bank together or one
20 of us would go over to the bank, whatever was necessary
21 to borrow the funds.

22 (Continued on next page.)
23
24
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ss9

Frank - direct

January, we probably only did three or four hundred dollars a month.

In 1970 we probably did maybe \$8000 a month.

Q In 1971 will you tell the members of the jury the monthly compensation that you and your partner were receiving?

A Well, in the first part of the year we were doing about two or three thousand dollars a month and then about April or May it went up to about eight or nine thousand dollars a month.

Q Did there come a time when that monthly average changed and increased further?

A Yes, in 1972 the change and the figure went up because we doubled the rate. We had been charging \$50 an hour and we went to a hundred dollars an hour.

Q Did you have a conversation with Mr. Yanowitch in respect of that billing rate?

A Yes.

Q What was that conversation?

A You want the whole conversation? I mean it was kind of involved. Part of the conversation was that I asked him to go to a hundred dollars. There was a lot of background before that in the conversation but the element I assume that you are asking for is that I

1 ssl0

Frank - direct

2 requested that we go to a hundred dollars an hour.

3 Q Did he agree?

4 A He said I should, I believe he said I should
5 write him a letter and he would take it up with the board
6 of directors.7 Q Thereafter in 1972 what was the monthly
8 billing average with respect to Homex' payments to your
9 firm?10 A Well actually we were doing probably less
11 work bu the billing because of the hundred-dollar an hour
12 rate were probably 12, \$13,000 a month.13 Q In the spring of '72 did you have occasion to
14 have some conversation with a real estate broker in respect
15 of the property now owned by Raseac Associates, the
16 partnership comprising you and Mr. Garrity?17 A I had had some conversations in September of
18 1971 about the property and then I, with certain builders
19 and developers and then I had some conversations in early
20 1972 with some more real estate people in Syracuse about
21 the property.22 Q Did you quote some price at which you and your
23 partner were willing to sell that property in that time
24 period?

25 MR. FELDSHUH: Objection.

T2B pm 1

hps

Frank: - cross

2 Q Let me see if I can help, if I might.

3 You spoke about John Garrity and he had a
4 familiarity with the property, correct?

5 A Yes.

6 Q It is fair to state when you spoke with John
7 Garrity you asked him about the details concerning the
8 property?

9 A Well, I suppose that's fair, yes. I don't
10 remember asking him any specific details. We talked
11 in generalities:

12 Is it a good piece of property, is there a
13 chance to turn it over. I'm sure I made some general
14 questions of that nature.

15 Q Didn't John tell you there was a Gulf Oil
16 option and the option was exercised and that in fact but
17 a short time before or a year before, the folks had gotten
18 \$80,000 for the exercise of that option, the folks which
19 included Falcone, your client?

20 A John didn't say that to me. Harold had
21 said in our conversation that an acre had been sold for
22 \$80,000 some time a year ago.

23 Q Excuse me, sir, would you try to confine your
24 answers to my questions. Thank you.

25 So the fact is, you did know that about

ps3

Frank - cross

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1
2 sir?

3 A No, not exactly.

4 Q In what respect is it not fair?

5 A It is not fair because I was, and John was
6 purchasing this property as a personal favor to Harold
7 and that we wanted to get general feeling that it was a
8 good piece of property but I would not say that we were
9 doing it in the same way we were doing it as if we had
10 an independent desire to by property.

11 Q Sir, I am going to borrow some language.

12 Do you know what "schlach" means?

13 A No. Well, I have an idea what it means.

14 Q If after your examination, you saw that this
15 was a "schlach" piece of property regardless of what...
16 Mr. Yanowitch told you, would you have bought it?17 A If it was a bad piece of property, which I
18 assume is synonymous with "schlach" in your question, I
19 don't believe we would have.

20 Q No matter what?

21 A That's right.

22 Q If John Garrity had told you that this is a
23 terrible piece of property, it's a swamp, you wouldn't
24 have bought it?

25 A No.

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Frank - cross

Q Add Mr. Yanowitch could stand on his head and you still wouldn't have bought it; is that fair?

A I think that's fair.

Q So I take it, sir, that in certain respects, from Mr. Yanowitch discussing this with you, you felt that the transaction had merit, did you not?

A I think that's fair, that the transaction had merit.

Q In connection with it having merit, you were seeking to make a fast turnover, were you not?

A I certainly would have been pleased to do that, yes.

Q I didn't ask you about pleased. I asked you if you would make a fast turnover, make some dollars in a fast deal?

A Well, yes, but we had our eye on our joint venture high-rise which was six months down the line. We had our eyes on a couple of different things with regard to the property.

Q And that in your judgment constituted some of the merit of the speculation, isn't that right?

A Yes.

Q And in your judgment and your experience, business and real estate-wise, this situation of your

ps6

you talked about, in response to Mr. MacDonald's question, about a release from a mortgage. Do you remember testimony in that regard, sir?

A Yes.

Q With respect to your conversation with Mr. Yanowitch, when the discussion turned to a release of the lien for the mortgage, did you understand that to be a promise from Mr. Yanowitch, that he promised you that he would get a release from the mortgage?

A If I asked him, I guess I would couch that in the word "promise". I don't know that I needed a promise from him. That's what he said.

Q You didn't need a promise?

A I don't think I needed a promise from him. He said that's what he would do and that was good enough for me.

Q You are a lawyer. Was it in the nature of a representation inducing you to go into this transaction?

A You mean would I have sued him on it?

Q Let's get to that in a few seconds. Let's start out with the facts, being a lawyer, and predicated upon your legal experience, would you characterize what Mr. Yanowitch said to you as a representation?

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Frank - cross

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A I think I would characterize it as an inducement.

Q Just as an inducement?

A An inducement.

Q Just like aspects, like the high-rise anticipation was an inducement, right, sir, in that same kind of thinking? Is that fair?

A Yes, that's fair.

Q I take it, sir, that with regard to this comment about releasing the lien of the mortgage a certain of the property, if you should select to sell, that portion, this kind of mechanism of a release from a mortgage and the procedure with regard to a release to a mortgage, that had been your experience prior to the talks with Mr. Yanowitch, had it not?

A Yes.

Q You had known about that in your professional work?

A The general procedure with regard to releases of mortgages?

Q Yes.

A Absolutely.

Q And it is a fact, sir, when a release from a mortgage is discussed between the mortgagor, the man who

1 ps8

Frank - cross

2 owes the money and the mortgagee, who holds the money,
3 generally there is a provision in the mortgage with
4 regard to that, isn't there, in your experience?

5 A Hopefully that's put into the situation before
6 the mortgage is executed.

7 Q If you had a client and he was depending
8 upon releasing part of the premises from the lien of the
9 mortgage you would make sure such a clause was in there.
10 Is that fair?

11 A That's fair.

12 Q Did you ask Mr. Yanowitch at the time of this
13 discussion, did you say to him in words or substance when
14 the release question came up:

15 Arrange, if you would, Harold, to modify the
16 mortgage by including therein a provision for a release
17 from the lien if we should find it necessary to have a
18 few acres sold off. Did you ever discuss that?

19 A I never said that to Harold.

20 Q Did it enter your mind as a good lawyer, a
21 man experienced in real estate transactions to ask that
22 the mortgage be modified in that regard?

23 A Not in this transaction. - It did not.

24 Q You didn't ask for that all despite the fact
25 that it came up in your conversation, is that right?

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Q From the point of view of making a deal, paying the \$45,000 or whatever you did pay?

A , on the inducement that Harold said he would get us a release I had no trouble with mortgage release provisions at all, I didn't.

Q You had no trouble?

A I had no trouble thinking about those at that time.

Q And the fact is, is it not, sir, that not only did you have no trouble thinking about it but you knew that if ever that time came despite what Harold said, and you had some hard cash in your hand and you went to the mortgagee, you knew you could work out some kind of deal?

A I'm sure.

Q Right. You went to, as you testified, the Central Trust Company to borrow the \$45,000 or 40,000 and you decided to make it 45. That's correct, isn't it?

A Yes.

Q You also testified in that regard that you had a very good line of credit with Marine Midland. Am I quoting you correctly? That's my recollection of what you testified.

A Yes.

Q Was the fact that back in 1971 you did have

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Frank - cross

such a good line of credit, isn't that so?

A Yes.

Q With Marine Midland?

A Yes.

Q Now when you went to Central Trust Company was that your first transaction with Central?

A No.

Q They had known about you and Mr. Garrity from prior experience, right?

A Yes.

Q With regard to that bank lending you some money did the bank say to you, "Listen, we want some guarantees in addition to your signatures," that of Mr. Garrity and yourself?

A No.

Q That subject never came up?

A No.

Q The fact is that no guarantees were ever given in connection with that \$45,000 loan, isn't that right?

A Absolutely correct.

Q So you went in there and stood upon your own credit, correct?

A Absolutely.

Q Sir, was there any unusual reason why you chose

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Frank - cross

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2 to go to Central Trust Company instead of Marine Midland,
3 unusual reasons?

4 A Only unusual reason is that Central was the
5 bank of Stirling Homex and if in our opinion, and based
6 upon Harold's conversation with me, Stirling Homex was
7 mentioned to the bank in terms of having a mortgage on the
8 property and having an intention to come back and do a
9 high-rise that Stirling's reputation with Central Company
10 would have further induced the bank to give us money, you
11 know, if there was any question in their mind. Just the
12 idea that Stirling liked the property would have --

13 Q Yes. In 1971 Stirling Homex had a very good
14 business reputation in the City of Rochester, did it not?

15 A Excellent.

16 Q Excellent reputation. And the fact that it
17 held the mortgage on this property was not an unusual
18 circumstance for you to mention to the bank?

19 A No.

20 Q As a matter of fact in the course of that con-
21 versation if Mr. Yanowitch didn't mention anything about,
22 "Have them call me," and you decided to go into Central
23 Trust Company and ask for the money you would have told
24 them anyway that Stirling Homex has a mortgage on this
25 property, wouldn't you?

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Frank - cross

1 A I might have said that anyway. If I had, if
2
3 I had put the, you know, if Central being the Stirling
4 Bank and the whole thing came together in my mind I might
5 have said that when I went into the application.

6 Q Well the fact is you did say it, didn't you?

7 A I did say it but Harold had suggested that I
8 say it, but I might have said it.

9 Q You would have said it anyway?

10 A I don't know that I would have said it anyway.
11 I might have said it anyway if I had thought about it.

12 Q Let me ask you this, sir.

13 In your business experience when you go in to
14 borrow money from the bank isn't it a customary thing
15 that happens in your experience that the bank says,
16 "What do you want to use the money for?"

17 Don't they ask you that sometimes?

18 A Yes, absolutely.

19 Q Don't you feel as a borrower from a bank that
20 you should honestly tell them, "Look, I'm borrowing the
21 money to do this and this with it," and on this occasion
22 to buy that land in Clay, New York; right?

23 A Exactly.

24 Q That is a fair report of what actually
25 transpired?

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Frank - cross

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A That's a fair report of exactly what transpired.

3

Q You have no knowledge of anybody calling

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Harold up on the phone and saying, "Say, we've got Mr. .

5

Frank here and he wants to borrow some money." You have

6

no knowledge of anything like that, have you, is that

7

correct?

8

A I have no knowledge that that happened.

9

Q Right, that's all, you have no knowledge of it

10

happening. So this was merely a suggestion by Mr.

11

Yanowitch, correct?

12

A In terms of my going to the Central Trust

13

Company?

14

Q Yes.

15

A Yes, that's right.

16

Q A mere suggestion. You could have gone to

17

any other bank, could you not, if you so decided?

18

A I suppose, but the circumstances --

19

Q I say you could have gone?

20

A I could have, I could have.

21

Q Sir, in March of 1971 did you know a Mr.

22

Berger?

23

A Philip Berger?

24

Q Yes, sir.

25

A Yes.

1 dwa6 Frank-cross

2 things never crossed my mind. I don't know that
3 that's responsive to your question.

4 Q I'm not asking you --

5 A I don't know whether I can answer the ques-
6 tion because I just never thought about suing Harold
7 on those --

8 Q Well, assume it wasn't Harold, would that in
9 your professional judgment constitute a basis for a
10 lawsuit? Answer yes or no, if you can, sir.

11 A It would not be a good lawsuit.

12 Q It would not be a good lawsuit?

13 A No, sir.

14 Q I take it, sir, in your ethical concepts
15 of the practice of law you just don't indulge in bring-
16 ing baseless lawsuits, am I correct in that regard,
17 sir?

18 A You are correct.

19 Q Now, sir, let us turn to Exhibit 97 in
20 evidence.

21 Sir, during the course of your direct tes-
22 timony you testified that your hourly rate was moved up
23 from \$50 to \$100; do you recall your testimony?

24 A Yes.

25 Q Do you also recall your testimony that

1 dwa7 Frank-cross
2 your hourly rate was so raised at your request, your,
3 Mr. Frank's, request?

4 A Yes.

5 Q I take it, sir, that Mr. Yanowitch didn't
6 tell you or suggest to you prior to your making that
7 request that you should come in and ask for \$10 an
8 hour, is that right, sir? Isn't that correct?

9 A I would have to recite to you the whole
10 conversation so you know how that came up. I didn't
11 do that on direct examination, but there was a lot
12 more to the conversation.

13 Q Well, sir, could you possibly answer my
14 question?

15 A I'm trying.

16 Q I don't want you to overthink it. Just --
17 if you can't answer it just tell me.

18 A Okay.

19 Q You can't answer it yes or no. And we
20 will go on.

21 MR. MAC DONALD: Maybe we would have
22 the question read again so Mr. Frank could have it in
23 mind and try to answer it.

24 THE COURT: Are you saying that in order
25 to understand who suggested it and how it came up you'd

1 dwa8 Frank-cross

2 have to give a longer answer? Is that what you
3 are saying?

4 THE WITNESS: Yes.

5 THE COURT: Well, then give the longer
6 answer.

7 A In December, when we collected all of the
8 time sheets --

9 Q All the wyat?

10 A All of the time sheets -- from all of the
11 attorneys in the office and put together a bill it
12 was a very large bill, and I called Harold and I said,
13 "I've got a very large bill here. I'm embarrassed
14 to send it to you, it's so high. You know you were
15 just leaning on us with so much work this month it's
16 really big, you know. Am I out of order sending
17 it to you?"

18 And he laughed at me and he said, "Bernie, you
19 are always going to be a country attorney."

20 Q You are always going to be what?

21 A "You are always going to be a country attor-
22 ney."

23 He said, "I've got a bill here on my desk
24 in front of me from some lawyers in Washington and
25 they are charging us \$200 an hour, and I got a bill

dwa9

Frank-cross

1 from some attorneys here in New York and they are
2 charging us \$150 an hour, and I don't know what they
3 are doing for us. And you guys are doing a super
4 job and you are only charging \$50 an hour and the
5 Harris Beach office in Rochester is charging us \$100
6 an hour when they do work for us, so stop worrying
7 about your bill. and send it out here."
8

9 So when he said that other law firms in
10 Rochester were -- the other law firm that they were using --
11 and they may have been using others -- were charging
12 him \$100, a couple of weeks later I got on the phone
13 and I said to him, "Harold, if somebody else is charging
14 you \$100 in Rochester, I'd like to charge Stirling
15 \$100."

16 And he said, "Okay. Send me a bill.
17 Send me a letter asking to do that and I'll take it
18 up with the board of directors.

19 Q You feel you were worth \$100 an hour?

20 A Yes.

21 Q You feel you were doing a good piece of
22 legal work as this, I think you said, Harris Beach
23 in Rochester?

24 A Equal or better.

25 Q Equal or better. Who is Harris Beach? I

1 dwalo Frank-cross

2 don't know --

3 A They are the second largest law firm in
4 the city.

5 Q How many partners or people working there,
6 lawyers, do they have?

7 THE COURT: Mr. Feldshuh, is it necessary?

8 MR. FELDSHUH: May I have a side bar
9 just to tell you why, your Honor?

10 THE COURT: No. If it's necessary
11 go and ask it. I don't want to go all the way through
12 Martindale & Hubbell.

13 MR. FELDSHUGH: I don't want to do that,
14 sir.

15 THE COURT: Go ahead and do it, it's
16 quicker.

17 A They have 40 or 50 partners and I don't
18 know how many associates. It's the second biggest
19 firm in town.

20 Q Nothing like Harold Yanowitch, the single
21 practitioner, when you first became associated with
22 him, am I right?

23 A One lawyer is not like 50, there is no
24 question about it.

25 Q Now, so you sent him your bill and I'm

1 dwall

Frank-cross

2 going to ask you one question, sir, in that regard.

3 You see this Exhibit 97. There are at least 50 pages

4 in here in which certain work is detailed. Now I

5 am going to ask you one question. Did you, to your

6 knowledge, or did your firm, to your knowledge, ever

7 submit an item in those bills wherein you did not do

8 the work that is therein represented?

9 Answer that yes or no.

10 A No, with one exception, which is a small
11 one, I would think, and you'll see that many of the
12 bills are marked "(evening)."

13 Q Is it that the exception you are talking
14 about?

15 A Yes, that's all.

16 Q The fact that it is marked "evening"?

17 A "Evening."

18 Q Are you saying to us that the work did not
19 happen in the evening?

20 A No.

21 MR. MAC DONALD: Objection. I think --
22 I thought the witness was going to elaborate on the
23 exception.

24 THE COURT: I don't think you let him
25 finish. Let him finish.

1 dwal2 Frank-cross

2 A Evening was an indication that we worked
3 after 5 o'clock or on weekends, and if we did that,
4 and we worked for an hour and a half we billed for
5 three hours.

6 Q The point being was it your customary prac-
7 tice upon the occasion of doing work after 5 o'clock
8 and on weekends to bill for twice the amount of your
9 normal rate?

10 A We felt that was -- it was our normal
11 practice because it took us away from families and
12 our own private time and we thought that that was
13 right, yes.

14 Q And that had nothing to do with Stirling
15 Homex, did it?

16 A No.

17 Q You billed that way to all clients?

18 A Right.

19 Q Apart from that circumstance, sir, every
20 item in Exhibit 97, Government's Exhibit 97, represents
21 work actually done by your firm and as to which your
22 professional judgment was that you were entitled to
23 these fees, correct?

24 A That's right.

25 MR. FELDSHUI: May I have half a second,

1 dwa13 Frank-cross-redirect
2 your Honor?

3 (Pause.)

4 MR. FELDSHUH: Thank you very much, your
5 Honor. I have no further questions.

6 THE COURT: Other cross examination?

7 MR. GAYNOR: I have no further cross
8 examination.

9 THE COURT: Redirect?

10 MR. MAC DONALD: Briefly, your Honor.

11 REDIRECT EXAMINATION

12 BY MR. MAC DONALD:

13 Q Mr. Frank, you may remember during cross
14 when Mr. Feldshuh read to you portions of your grand
15 jury testimony on March 31, 1976.

16 A Yes.

17 Q Would you tell the ladies and gentlemen
18 of the jury -- withdrawn.

19 You are testifying here today, are you not,
20 under immunity assurance?

21 A That's right.

22 Q That immunity assurance contains an exception
23 which is important to the jury's understanding, is
24 it not?

25 A Yes.

1 dwal4

Frank-redirect

2 Q Would you tell the members of the jury
3 what assurances you received concerning the oath you
4 took today when you took the witness stand?

5 MR. FELDSHUH: Objection, your Honor.

6 THE COURT: Overruled.

7 A That all of the testimony that I gave on the
8 second appearance in front of the grand jury and
9 obviously thereafter would be complete and true and
10 accurate.

11 Q That includes today?

12 A And today.

13 Q On the first appearance before the grand
14 jury, March 31, '76, there were certain omissions
15 which were in your answer, which were apparent from
16 the answer which Mr. Feldshuh read, right?

17 A That's right.

18 Q Would you tell the members of the jury
19 what occasioned those admissions and thereafter
20 occasioned your solicitation and receipt of immunity
21 to supply the missing elements?

22 A I was very sensitive to talking about the
23 inducements that Harold had made in terms of getting
24 us into the real estate transaction. I was afraid
25 that something I might say might -- might hurt. I

1 hpa2 Frank-redirect

2 services that we were called upon to perform in
3 getting those fees were maybe uncomfortable --

4 MR. FELDSHUH: Maybe what, sir?

5 A I just never talked about that, those fees,
6 although I don't believe necessarily that was ever
7 asked, but I never talked about those fees in my
8 first appearance in front of the grand jury.

9 Q Did you tell the members of the grand jury
10 what occasioned the discomfort, illustrative to those
11 services?

12 A The services that gave me the discomfort?

13 Q Yes, sir.

14 A We were very often called upon to perform
15 services that you really didn't need attorneys to per-
16 form, although they wanted us or asked us to perform
17 them. I suppose you would call them public rela-
18 tions, you might call them investigations. I don't
19 know what terms you would call them, but we didn't
20 really need attorney so do them, but they wanted us
21 to do them and called upon us to do them.

22 Q Do you remember one or another that you
23 did yourself so you can tell us exactly what you were
24 asked to do, who asked you and what you did.

25 A On several occasions Harold would ask me

hpa3

Frank-redirect-recross

1 to stop at his house and pick up magazines, magazine
2 articles, fairly substantial magazine articles, on
3 the housing industry, population growth, modulars as
4 the key to the housing boom, and he would ask me to
5 read them, and they were very extensive and I would
6 take them and read them. It might take me several
7 days or a week, whatever the articles were and I
8 would in fact read them and I would bill them for the
9 time I spent reading them because it was taking time.
10 And then maybe I wouldn't hear for a while and
11 then Harold or somebody would call, and ask me if I
12 would go talk with a banker or a politician or somebody
13 and converse with them or tell them about the things
14 that appeared in the magazine articles, about the
15 housing boom, and that modular housing was the answer
16 to the housing needs of the future.

17 That's one example that I can think of.

18 MR. MAC DONALD: We have no further re-
19 direct examination.

20 RECROSS EXAMINATION

21 BY MR. FELDSHUH:

22 Q Mr. Frank, did you prior to your first
23 appearance before the grand jury talk with Mr.
24 Yanowitch as to the fact that you had been subpoenaed
25

1 hpa4

Frank-recross

2 to so appear on or about March 31, 1976?

3 A I have not talked with Mr. Yanowitch in --
4 I didn't and I haven't talked with Mr. Yanowitch in
5 a year and a half.

6 Q And with regard to your appearance in June
7 of 1976, if I asked you the same question, would your
8 answer be the same?

9 A Exactly the same. I have not talked
10 with Mr. Yanowitch.

11 Q So it is the fact that at no time did Mr.
12 Yanowitch tell you how you should testify in connection
13 with these grand jury proceedings, correct?

14 A Correct.

15 Q Now, sir, in the course of your practice
16 you have come across situations that we lawyers talk
17 about being tough, legal hard work?

18 A Yes, sir.

19 Q Tough problems?

20 A Yes.

21 Q And sometimes in the course of that prac-
22 tice you had noticed that the clients had other
23 matters, that you would just sail through nice and easy
24 and you would begin to wonder how come you never
25 get any of that stuff; did that ever happen to you?

1 hpa5 Frank-recross

2 A I'm sure many times.

3 Q Now, sir, it is the fact that you testified
4 that you did in truth and honesty spend those hours
5 doing that assigned reading, correct?

6 A In the instance that I told you about I
7 did the hours of reading that I put down there, ab-
8 solutely.

9 Q Truthfully and honestly the hours that
10 you spent so reading?

11 A Yes.

12 Q In connection with your work in construing
13 that Homex was an expanding company now, and addressing
14 yourself to the period 1971, if you would please,
15 where its business was expanding throughout the
16 United States and you were asked to read up about your
17 client's business, didn't you feel at that time it
18 would be a proper assignment for you professionally
19 to know as much as you can about your client's business
20 and its relation to the public as it was then being
21 defined in the press and other media? Do you think
22 that was important to your work for your client?

23 A I didn't make a judgment. It may very well
24 have been. I don't think I made that judgment at
25 the time but you may be right, it may have been.

1 hpa6

Frank-recross

2 Q Sir, there have been occasions, have
3 there not, where you have been called upon by your
4 client to negotiate business aspects of a deal, isn't
5 that true?

6 A Yes.

7 Q And aren't you familiar with the frequent
8 principle that lawyers use to the effect that "I'm
9 not here to judge the business aspects of a deal,
10 my client wants it, I'm only here to take care of
11 the legal matters"; you have heard that?

12 A Yes.

13 Q Despite that frequent comment it is the
14 fact that it is your experience as you have now testi-
15 fied that you have undertaken to discuss and advise your
16 client as to the business aspects of a deal, right?

17 A Well, I would like to say that I try to
18 avoid doing that. I assume I must have done it on
19 a few occasions. I probably can't avoid it, but
20 I would like to try.

21 Q If your client turned to you and said
22 to you, "Based upon your knowledge of our business do
23 you think that we could legally do something?" it would
24 be important for you to know all the aspects of his
25 business, isn't that fair?

1 hpa7

Frank-recross

2 A Yes.

3 Q Now, would you not say, sir, in connection
4 with these so-called reading, public relation -- I
5 withdraw that.

6 You did know, did you not, that Stirling
7 Homex Corporation had been written up in the press
8 a great deal during the year 1971 from the point of
9 view of constructing housing throughout the United
10 States?

11 A If you lived in Rochester you certainly
12 knew Stirling Homex. The press was always replete
13 with articles about them, that's right.

14 Q And those articles in the main were favor-
15 able, were they not?

16 A Oh, yes.

17 Q And sir, didn't you think it important that
18 you should know the image of your clients since it
19 had a public image in relation to the developments
20 of the industry in which it was?

21 A Well, as I say, you may be right. When
22 I got the articles I did not make that judgment. I
23 never knew if I was ever going to be called upon to
24 ever use the articles. The articles is one example,
25 but sticking with that example I read the articles,

1 hpa8

Frank- recross

2 and I always questioned why was I reading them but
3 I read them.

4 Q You were called upon to meet with other
5 people?

6 A Eventually I was, yes.

7 Q And with that knowledge, did that knowl-
8 edge help you in your meeting with them?

9 A I certainly probably used quotations or
10 did certain things in those conversations that I pulled
11 out of the articles.

12 Q So it is fair to say that they aided and
13 assisted you in your representation of your client,
14 isn't that right? That's fair, isn't it, sir?

15 A That's fair..

16 Q At no time is it the fact, is it, that
17 Mr. Yanowitch in words or substance, directly or in-
18 directly, told you to put in your bills anything
19 that was false and untrue?

20 A No. I mean that's true.

21 Q You are absolutely certain he never told
22 you to do that, right?

23 A That's true.

24 Q And he never told you in words, "Raise
25 your bill from \$50 to \$100 an hour; it was your idea

1 ps2 Frank - recross

2 MR. GAYNOR: I have one recross, your Honor,
3 if I might.

4 THE COURT: Yes.

5 RECROSS EXAMINATION

6 BY MR. GAYNOR:

7 Q Mr. Frank, did you ever confer with David
8 Stirling about the Raseac-Falcone transaction?

9 A No, sir.

10 Q I ask you the same question with respect to
11 William Stirling.

12 Your answer is the same?

13 A My answer is exactly the same.

14 Q Did you ever discuss hourly charges of yours,
15 the amount of bills, with either David or William Stirling?

16 A No, sir.

17 MR. GAYNOR: Thank you, your Honor.

18 MR. MacDONALD: Your Honor, I would like to
19 inquire whether the matter, the two questions and answers
20 there --

21 THE COURT: From the grand jury testimony?

22 MR. MacDONALD: Yes, sir.

23 THE COURT: You may read any portions of the
24 grand jury testimony that relate to the subject matter
25 with respect to which portions have been read either

ps4

Frank - redirect

"Q And in particular did you intentionally leave out of your description of a meeting with Mr. Falcone and a phone call with Mr. Yanowitch Mr. Falcone's having described to you that he had received a promise in 1969 from Harold Yanowitch to hold he and his investment partners harmless, or equally against loss, and that he wanted you to intercede with Mr. Yanowitch to obtain performance on that promise?

"A I alluded to it in my previous testimony, and I was not anywhere near and specific as I should have been.

"Q In addition did you omit to disclose to this grand jury the fact that Harold Yanowitch promised you increased legal fees so that a bank loan of \$44,000 that you obtained would not cause you any difficulty in terms of its being repaid and the interest payments being repaid?

"A I omitted that along with other inducements, promises that he made to me in connection with the transaction, yes.

"Q In each of those two examples that we just referred to the omissions were deliberate and you apprehended and comprehended that fact that you

ps5

Frank - redirect

were omitting information so that you would not be incriminating yourself and Mr. Yanowitch in fully and accurately describing the transactions.

"A That is correct."

Page 5, line 9:

"Q I would like to direct your attention now to on or about February 17, 1971, and ask you if you had a meeting with Mr. Falcone in your law offices that day, and if so would you tell, please, your best recollection of the substance of the discussions as they took place?

"A Yes. Mr. Falcone appeared in my office on or about that date. He stopped in on an informal basis, I am not sure he intended to see me, but he did in fact ask to come into my office and chat. We passed some niceties. He told me about the property that he had in Syracuse that he had bought from Stirling with two other people. That Harold Yanowitch had been the factor which brought the deal together, that is how it was put together originally. He said that moneys were due for the property, or that is due on the property to pay off mortgages and other obligations, and he wasn't, and his partners weren't about to come up

ps7

Frank - redirect

"A I don't know who called you, but the initial part of the conversation was my reference, or my statement to Harold that Mr. Falcone was annoyed or pressing about the promise to get him out in a year, and nothing had been done. Harold in response to that got extremely angry and annoyed and upset and he said that he had made a promise to get him out in a year, but that the high-rise project was bogged down and he couldn't get them out in a year, and that Mr. Falcone knew that and he couldn't understand why Mr. Falcone and the other people in the deal who were his long time friends would walk away from the deal and just leave it knowing about the problem."

"He indicated in words or substance that he thought that this was a betrayal to him on their part. He reiterated that he was very upset, but for an additional reason, and that was because the Stirlings were saying that he was incompetent, a jackass, he put a deal together a year before with his good friends who were influential people in the community, good businessmen, and 14 months later the deal was falling apart and they were saying what kind of a brilliant guy are you Harold

1 dwal Davis-direct

2 THE WITNESS: I'm sorry.

3 MR. FELDSHLH: Thank you.

4 A "Builder-seller contracts were prepared
5 with respect to projects involving our Clay Develop-
6 ment Corporation and our Progressive Housing Corpora-
7 tion. Charles Davis was assisted in getting the
8 proposals prepared for submission. At the request
9 of Carl Wren we arranged for the reservation in Delaware
10 of the name Region 9 UAW Community Union of New York,
11 Inc. We are awaiting information from Carl Wrenn
12 as to whether we should proceed to set up a non-
13 profit corporation under this name.

14 "2. Clay property.

15 "We have prepared a land contract between
16 Kabeth Properties and Northern Gateway Development
17 Corporation with reference to property of Kabeth in
18 Clay, New York. Carl Wren is meeting with representa-
19 tives of the purchaser on December 23, '70 for execu-
20 tion of the document.

21 Q Judge Davis, can you tell the jury if
22 you recall the occasion for your preparation of a land
23 contract between Kabeth properties and Northern Gate-
24 way Development? Did you have a conversation with
25 Mr. Yanowitch in that connection and, if so, tell us what

1 hpa3 Davis-direct
2 connection with this, if you remember.

3 A It was to state to Professor Mauriello
4 the broad outlines of the proposed contract and to
5 get his opinion orally whether he felt that this would
6 constitute for accounting purposes a valid, bona
7 fide sale, and then ask him to confirm his opinion,
8 given orally, in writing.

9 Q Can you tell us what you remember saying
10 to Professor Mauriello thereafter on that subject,
11 and what did he say to you?

12 A What Professor Mauriello said to me?

13 Q Yes, sir.

14 A He said in substance that he thought on
15 the basis of the information that I was giving him that
16 he thought it was and would constitute a sale for ac-
17 counting purposes.

18 Q Would you read, please, the notes that
19 appear on that white piece of paper?

20 A You are referring to 99082?

21 Q Yes, sir.

22 A Well, "treated as a conditional sale with
23 price fixed," these notes are kind of garbled, "Govern-
24 ment will compute interest at 5 per cent. American
25 Institute of CPAs working on a similar table."

hpa4

Davis-direct

That's about all that I can decipher but I can say that from these notes I immediately prepared on a yellow sheet a summary to Mr. Yanowitch.

Q Is that three pages earlier, 909077?

A Yes.

Q Would you read that to us, Judge, please?

A I immediately prepared this following my talk with Professor Mauriello, entitled "Notes Recall to Joseph Mauriello Re: Kabeth Properties, Inc., Property at Clay, New York.

"The sale contract (land contract) as proposed, to wit, sale by Kabeth to Northern Development Corporation? Have subject property for consideration of \$2.1 million with purchaser paying \$210,000 on 12/30/70, and a balance of \$1.890 million. The purchaser will be given possession upon paying \$210,000. The purchaser will have the right to develop and improve the property, and if by reason of the purchaser's default the seller terminates the contract moneys paid and improvements made will be retained and inure to the benefit of the seller as liquidated damages. Taxes, assessments, liability and fire insurance to be maintained and paid for by the purchaser.

"The contract provided that upon the

hpa5

Davis-direct

purchaser paying the sum of \$210,000 the purchaser would be given equitable title to the property.

When the balance of contract price of \$1.890 million is paid on December 30, 1975 the seller will give purchaser a deed conveying legal title. The circumstances and details of this transaction were given by telephone to Professor Joseph Mauriello, who advises as follows:

"1. As there is no relationship between buyer and seller, this is an 'arm's-length transaction,' the contract is bona fide.

"2. The proposed land contract is in the nature of a conditional sale."

hpa

Davis-direct

1296

1 The execution date of the contract is 12/23/70 pursuant
2 to the terms of the contract. The down payment
3 of \$210 was paid by the purchasers on 12/31/70.
4 We received on 12/31/70 Professor Mauriello's
5 memorandum confirming the information he had given us
6 orally with reference to the effect of the land con-
7 tract regarding the Clay property. In substance,
8 the land contract is likened to a conditional sales
9 contract for personal property. Although title
10 is deferred until final payment, the transaction is
11 recorded, currently as a consummated sale. With
12 reference to the lack of an interest payment upon the
13 unpaid balance, except in the case of a default by
14 the purchaser, it is Professor Mauriello's opinion
15 that the Internal Revenue Code, Section 483, requires
16 the imputation of interest where gains are reported
17 on deferred payment sales where payments under the
18 sale are due more than six months after the sales
19 date."

21 Q I would like to hand you now Government's
22 Exhibit 572 and 581 and 582 and ask if respectively
23 those exhibits are, first of all, your letter to
24 Professor Mauriello with respect to soliciting an
25 opinion and two memoranda opinions by him that were

hpa

Richardson-direct

1416

1 picked up one and looked at it and hurriedly read it
2 and I said, "You sure did a good job with my signature."

3 He said, "I really didn't sign it, my
4 secretary traced your signature," and I said, "Rubel,
5 why in the world did you do that for?"

6 He said, "Well, I was being pushed by Mr.
7 Yanowitch to get some letter back up to them that
8 was going to be placed in the files and never would
9 be seen and I'm just really sorry I done it,"
10 and he cried a little, saying he was just sorry it
11 happened.

12 I said, "What in so-and-so are you going
13 to do about it?"

14 He said, "Ain't but one thing I know what
15 to do about it and that's to tell the truth. I've
16 been practicing law for over 18 years and that's the
17 first time I ever done like this and I'll tell the truth
18 and take the consequences."

19 I said, "What would be the consequences?"
20 and he said, "I don't know, but that's the only thing
21 I can say."

22 I said, "I'm sorry, but if I can help you
23 I'll be glad to do it."

24 Then I left.
25

mcs

Richardson - direct

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Q What was that?

A I thought he had changed his story. He had told him that he had got the letter from Mr. Phillips' office and brought it to my office and I wouldn't sign it, and he carried it back and gave it to Mr. Phillips.

Q What did Mr. Phillips say to that?

A Well, he was hoping that Mr. Little might change his mind about that.

Q Directing your attention to in or about July 1976, did you receive an additional request to return before the grand jury?

A Yes, sir, I did.

Q On that occasion did you have a conversation with Mr. Macbeth and myself before your second grand jury appearance?

A Yes, sir.

Q Within that conversation did you receive certain assurances with respect to an immunity for your prior false testimony before the various agencies that you had been describing?

A Yes, sir.

Q What were those assurances?

A That if I would start now and tell the truth and forever tell the truth that I would be forgiven for

1 mcs

Richardson - direct.

2 lying in the past.

3 Q What conditions, if any, were attached to
4 the immunity for your past false statements?

5 A If I should ever tell one more lie not only
6 would I be prosecuted for that one, but for all the other
7 ones that I had told.

8 Q I show you Government's Exhibit 774 for iden-
9 tification and ask if that is a written statement which you
10 received in connection with that interview?

11 A Yes.

12 Q Following your second appearance before the
13 grand jury, did you once again have a conversation with
14 Mr. Phillips?

15 A Yes.

16 Q Where was that?

17 A I had a briefing at the airport when I got
18 back.

19 Q What was said?

20 A He asked me what did I say and I told him I
21 told the truth; that I was sorry that I had to tell the
22 truth.

23 He said, well, he appreciates what I had done
24 and we'd talk some other day.

25 My wife was at the meeting too.

hpa3

Kuveke-direct

1525

1 you recall.

2 MR. FELDSHUH: Fix the time.

3 A I think in the preparation of the letter
4 I had spoken to Mr. Karkow. I don't recall if I
5 had spoken to other people. I can't recall anything
6 more specific than that.

7 Q Would you keep reading, please.

8 A "2. We expect to receive payment for
9 the amount of currently due from Raseac Realty, Inc.,
10 although we can't be certain as to date. We are assured
11 that the corporation is solvent and that plans are going
12 forward to develop the property as a shopping center.
13 The road on which the property is located has been
14 widened into a four-lane highway, making the land much
15 more attractive from a commercial standpoint.

16 "The population of the surrounding area
17 has increased significantly during the past year.
18 The management of Raseac is actively negotiating with
19 prospective shopping center tenants. It appears
20 likely to us that the venture will be a commercial
21 success and that we shall receive payment in due
22 course.

23 "3. The notes receivable are collateral-
24 alized by land which has a value in excess of the
25

hpa

Kuveke-cross

1747

1 of your administration of that arrangement?

2 A A good number of them did.

3 Q About how many, sir?

4 A Oh, I would say over 50; maybe somewhere
5 between 50 and 100.

6 Q Between 50 and 100? Did I hear you
7 correctly?

8 A Yes.

9 Q And the 50 or 100 people so borrowing, there
10 was nothing wrong about that, was there, sir, with
11 regard to your arrangements?

12 A I don't think so.

13 Q With regard to those loans, there was
14 no guarantee, as far as you know, with regard to anybody
15 furnishing the bank a guarantee as to those loans?

16 A You mean the company or people?

17 Q The company, sir.

18 A No, I don't believe so.

19 Q You don't know of any guarantee by David
20 Stirling, do you, sir?

21 A No, I don't.

22 Q As far as the borrowers were concerned,
23 do you know whether they paid their loans and the
24 interest on the loans, as far as you know?
25

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Kuveke-cross

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A Some did and some did not.

Q And you kept in touch with that situation,
is that right?

A No, sir, I did not.

Q How did you know some did and some did
not?

A After the people didn't pay the bank would
contact the company.

Q And the man that they contacted in the
company was you, isn't that right?

A On some occasion.

Q Now, sir, with regard to the people that you
made arrangements for, supervised the program of
their borrowing, weren't some of them members of the
carpenters union?

A The people that worked for the company that
were in the carpenters union, that's correct.

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Q Well, there is nothing wrong in that, is there, as far as you were concerned?

A I don't think so.

THE COURT: There has not been any objection to these constant questions about whether there is anything wrong or not anything wrong, but it seems to me they are objectionable. If there are going to be arguments about the legal consequences of things that is for us and the jury to work on together, not for the witnesses to characterize. Let's discontinue that.

MR. FELDSHUH: I take it your Honor has instructed me to eliminate questions of that kind?

THE COURT: Yes.

MR. FELDSHUH: I respectfully except, your Honor.

Q Now, sir, with regard to administering this program you saw to it, did you not, that there was proper documentation by these employees who sought to borrow the money; isn't that so?

Answer yes or no, will you, please?

A No.

MR. MacDONALD: We object to the interruption of the witness' attempt to answer by the repetition of a second, different question. We ask counsel to await

hpa8

Griffin-cross

name Spivey, but --

THE COURT: I'm sorry, Judge. I want to interrupt because I want to invite you briefly to the side bar.

(At the side bar.)

THE COURT: I think I'm going to subside on the subject after this, Mr. Feldshuh. You have a judge sitting there and you are asking him what he thought was usual or unusual. It is not always true who is the source for what, but I don't see the distinctin here. If you feel you can ask each witness whether there was anything unusual about anything, I suppose it follows that the government may too. And, for example, if this judge didn't think there was anything unusual about that May 20th exchange of letters, I would be a little surprised, or about certain of the encounters he had with Rubel Phillips.

I don't know where you are heading.

I am suggesting now, subject to the good judgment of government counsel, who do not want to inject reversible error in this record, that if this is a way to go, then we will accept it as a way to go in this case and from now on people are going to be permitted to say what they thought was unusual,

hpa9

Griffin-cross

smelly, dirty, or whatever.

I don't care much for it but I don't see government counsel objecting and I am just giving you this combined suggestion and admonition. Now you may proceed however you see fit.

MR. FELDSHUH: May I put a comment on the record, with your permission?

THE COURT: Yes.

MR. FELDSHUH: Sir, I think there has been injected into this case -- the purpose of this interrogation was to show that in fact the assignment out to these six counties within the area where the judge had familiarity was not a situation that was frustrating the main purpose of the nonprofit of GGC. Rather, indeed, it was implementing that purpose even though it may have been a subdivision of the effort.

THE COURT: You may be right. There has been no objection. I'm just telling you that I don't hear your examination being as sharply refined as the item you have just picked out, and I have just given you my thought on this. Now the lawyers are going to have to handle the case in the adversary way and you will be guided or not by my suggestion. If

1 hpal0

Griffin-cross

2 there are no objections I will allow it.

3 MR. MACBETH: Your Honor, we would like
4 to object. In objecting to this kind of testimony
5 it is the government's position we object to any dis-
6 cussions of what may be normal or not normal. At
7 this time the government does object to the question.

8 THE COURT: It's about time you said
9 something. I am instructing you not to do this any
10 more. You may ask him what the duties were, what
11 this was, and you are not to ask judges, or even more
12 reliable people, what they thought was usual or any
13 of those things.

14 I have already instructed you on this.
15 Now I am giving you a firm instruction. Don't do it.

16 MR. FELDSHUB: May I respectfully excent.

17 THE COURT: You always have an exception.
18 This is the federal court.

19 MR. FELDSHUB: I know that, sir, but I
20 have heard about harmless error.

21 THE COURT: If this is erroneous it is
22 not harmless.

23 MR. MUKASEY: Pursuant to the request I
24 made some time before, can we at this point take an
25 application?

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mcs

Marshall - direct

2

Q Mr. Marshall, did there come a time when you

3

had occasion in or about March 1970 to have a telephone

4

conversation with David Stirling with respect to certain

5

loans?

6

A Yes. David Stirling called me and asked me

7

if I would loan some individuals money to purchase stock

8

providing he guaranteed it personally, and I had loaned

9

money to other people prior to that and --

10

MR. GAYNOR: I move to strike what he did with

11

respect to other people. That was not the question.

12

THE COURT: All right.

13

Mr. Marshall, if you would, just confine your

14

answers to the precise question.

15

THE WITNESS: Yes, sir.

16

Q What did you tell Mr. Stirling in response to

17

his request?

18

A At that time David Stirling had a line of credit

19

with the Central Trust Company personally.

20

THE COURT: No, no, Mr. Marshall. He just

21

asked you what did you tell Mr. Stirling in response to

22

that request. Just tell us what you told him.

23

THE WITNESS: Yes, that I would loan the

24

individual's money.

25

Q Was there any discussion beyond that with respect

1 CS

2 THE COURT: You mean that defense of Mr.
3 Gaynor's as to which, at the moment, I am pessimistic on
4 his behalf?

5 MR. MacDONALD: Yes, your Honor.

6 THE COURT: I have given a direction on that.
7 That defense is of now precluded. It is, in any event,
8 not part of the Government's direct case and if and when
9 I get a memorandum from Mr. Gaynor persuading me that
10 my feeling about it is wrong there will be no harm done
11 because it is a matter that he can put on in his own case,
12 in any event. So, obviously, it is outside the scope
13 of any direct of any witness, as I understand it. So,
14 that is the position.

15 If you are planning, Mr. Gaynor, as I'm sure
16 you are not, to cross-examine in an effort to organize
17 that defense, I trust you won't do it.

18 MR. GAYNOR: Your Honor, I had planned to cross-
19 examine with respect to Mr. Marshall and the Chemical Bank
20 not for the purpose of interposing a defense that the
21 Chemical Bank had worked out a position, and so forth.
22 I did want to show the relationship, because he testified
23 before that he was put on the board of directors of
24 Stirling Homex as a watchdog. Those are his words.

25 THE COURT: Where is that?

1 cs

2 MR. GAYNOR: I don't want to take your time,
3 but it was either at the SEC, when he testified or --

4 THE COURT: When was he put on as a watchdog?

5 MR. GAYNOR: I can get it for your Honor.
6 I think it was in 1970. I think that he was still at
7 Central Trust, but he remained on the board of directors
8 thereafter. He says that he was a watchdog on the board
9 of directors. I want to bring that out.

10 THE COURT: Why?

11 MR. GAYNOR: Because I think -- I want to show
12 motive on Mr. Marshall's part. He had a direct conflict
13 of interest as a member of the board of directors of
14 Stirling Homex, a conflict with regard to other entities
15 outside, and I think he has a motive here.

16 THE COURT: To give false testimony; is that
17 what you are saying?

18 MR. GAYNOR: I think his whole relationship to
19 my client was false.

20 THE COURT: You are saying that he has a motive
21 here that goes to his credibility?

22 MR. GAYNOR: Not his credibility to show whether
23 he was lying in the past and lying now, no, I'm not trying
24 to do that. I'm trying to show that he had a motive in
25 his whole relationship with this company which affected

cs

People can have all kinds of motives for testifying.

I'm not going to let you bring out the whole story of his life.

MR. GAYNOR: May I bring out these facts on his motive?

THE COURT: No, not if you stand there and tell me that you don't believe they go to credibility.

Then my next question, on which I must confess you are not helping me, is what material issue in the case does his motive go to, if not to credibility? And you just don't tell me anything about that.

MR. GAYNOR: Your Honor has ruled on my theory of defense and I'm stymied. I don't know how to get around that. My point is I thought it was a good, viable defense.

THE COURT: And I think you are just trying to get back in that defense here. The more we talk the more I think I'm convinced that none of this goes to credibility, so I won't allow it. I'll do the best by you I can. I give you a broad instruction of what goes to credibility, but you are the lawyer and I'm not. It is perfectly evident to me in candor, as always, that you don't believe it goes to credibility and you are not prepared to say it does and if you are not in your own

1 hpal4 Marshall-direct

2 to the part which is illegible in the witness' state-
3 ment.

4 THE COURT: The jury will disregard the
5 part that is illegible and not try to make it out.

6 (Government's Exhibit 963 was received
7 in evidence.)

xx 8 (Mr. MacDonald read from Government's
9 Exhibit 990 in evidence.)

10 Q I would like to at this time hand you,
11 Mr. Marshall, Government's Exhibits 112A and 112C in
12 evidence.

13 My question is, are those the letters to
14 and from the Farmers Home Administration referred to
15 in your memorandum?

16 A They are.

17 Q Or copies thereof?

18 A Yes.

19 Q I would like to ask you now, Mr. Marshall,
20 do you have a recollection of discussing with anyone
21 whether or not to leave a copy of the letter from the
22 Farmers Home Administration, 112C, with Chemical
23 Bank during your visit there?

24 A I was asked by David Stirling and Yanowitch
25 not to leave that letter.

1 hpal5

Marshall-direct

2 Q Do you recall if any further reason was
3 given in that regard?

4 A No.

5 Q Did you leave a copy of that letter, 112C, at
6 Chemical Bank?

7 A No, I did not.

8 Q Do you have any information whether a copy
9 was obtained by any bank or bankers present at that
10 time?

11 A I believe they made a copy but not to
12 my knowledge.

13 MR. MAC DONALD: I will read further.

14 (Mr. MacDonald continued reading from
15 Government's Exhibit 990 in evidence.)

16 Q With respect to the handwriting on Exhibit
17 968 that you have read to us, can you tell the
18 members of the jury who, if anyone, at Stirling Homex you
19 discussed those handwritten matters with?

20 A Well, there were further revisions in the
21 final letter and they were all discussed with Mr.
22 Yanovitch and Stirling.

23 Q I would like to direct your attention
24 now to in or about April 15, 1971 and ask if in that
25 time frame you had occasion to have a conversation

1 hpa3

Marshall-cross

2 Q What was the date of the supposed oral
3 guarantee?

4 A In, I believe, the first part of March, '70.

5 Q This written guarantee here is dated June
6 26 th.

7 A June 26th.

8 Q How much money did Central Trust loan on
9 this supposed oral guarantee which you handled?

10 A A little over \$200,000.

11 Q As an officer of the bank you loaned all
12 of that money on an oral statement of David Stirling?

13 A Yes, I did.

14 Q And if those loans weren't paid and
15 all you had was the oral guarantee of David Stirling
16 what remedy would your bank have had?

17 A Very little.

18 Q Pardon me?

19 A Very little.

20 Q Was it a regular course of business of
21 yours and the bank to loan sums of money like that
22 on oral guarantees?

23 A I did frequently, yes.

24 Q Other than through Harper Sibley, did you
25 do it for anyone else?

hpa4

Marshall-cross

1
2 A That would cover a lot of years. I don't
3 remember any specific ones but I've done it, yes.

4 Q Is that a prudent practice?

5 A I don't know how prudent -- it's not a
6 normal practice.

7 Q Looking at this, sir, you were at Stirling
8 Homex as an officer and member of the board of directors
9 at or about the date of that letter?

10 A No, I was not. I was still at the bank.

11 Q Were you out to Stirling Homex from time
12 to time?

13 A At this point?

14 Q Yes.

15 A I don't believe I was out there more than
16 once or twice. I've forgotten the exact date I went
17 to New York to introduce them to Chemical Bank but
18 it was about that time.

19 Q Did you know Joseph Lane Kirkland?

20 A No.

21 Q Did you know he was a cousin of Harper
22 Sibley?

23 A No, I did not.

24 Q Did you know how to spell his name?

25 A Of course.

2 to.

3 "Q He has not given us any executive committee
4 minutes indicating these minutes under Mr. Stirling's
5 file.

6 "A I was just as disappointed not to find them
7 as you were"?

8 A I don't remember that testimony.

9 MR. MAC DONALD: May I have the page
10 reference?

11 MR. GAYNOR: Page 72, line 21, and it
12 goes over to the next page, on 73 through line 6.

13 Q We are still talking about these loans
14 to these individuals, Mr. Marshall.

15 A Right.

16 Q Do you remember testifying at the Securities
17 and Exchange Commission?

18 A I testified there four times, I believe.

19 Q Do you remember being asked these questions
20 and giving these answers before the Securities and
21 Exchange Commission, page 261:

22 "Q How did Stirling or Yanowitch come to have
23 you arrange the loans? Did they give you a guarantee?
24 Were they involved?

25 "A I don't believe so.

1 Q What was it all about, just walking in
2
3 off the street?

4 A Well, I wouldn't call it that.

5 Q But they just came in and spoke to you?

6 A Probably one of them called me and asked
7 me to loan so-and-so money and I said yes.

8 Q Without getting a financial statement?

9 A Yes"?

10 Do you remember being asked those questions
11 and giving those answers?

12 A I do not remember that, no.

13 Q Mr. Marshall, when you were at the bank
14 during this period of time you were a senior officer
15 of that bank, weren't you?

16 A Correct.

17 Q Your primary function was to okay loans,
18 isn't that true?

19 A Right.

20 Q Who did the details, who did the paper
21 work?

22 A Well, generally each officer had somebody
23 who did the detail work.

24 Q Who was the officer that you know handled
25 it in this case?

1 hpa18

Marshall-cross

2 A Not to my knowledge. I don't know.

3 Q You don't know that, do you?

4 A No.

5 Q What did you know about this transaction
6 other than -- you told us about Mr. Stirling. What
7 else did you know about these individuals?

8 A I know that David Stirling asked me on
9 the telephone if I would loan certain individuals money
10 with his personal guarantee and I told him I would.
11 The detail of that was then handled by Donald Sasso,
12 and whether he contacted David Stirling or Harold
13 Yanowitch, I do not positively know.

14 Q You don't know that?

15 A That's right.

16 Q As a matter of fact, that was, you say,
17 some time in March?

18 A I believe so.

19 Q And this supposed letter of David Stirling
20 might have gone to Mr. Sasso then, is that right?

21 A It was addressed to me. It could have gone
22 to Donald Sasso.

23 Q Mr. Sasso is the one who has all these
24 details and knowledge?

25 A Right.

1 hpa19

Marshall-cross

2 Q Did you talk to him before you came here
3 to testify?

4 A Here?

5 Q Yes.

6 A I've talked to him at various times over a
7 good many years.

8 Q But did you talk to him immediately prior
9 to coming to testify?

10 A No.

11 Q You have discussed your testimony or,
12 rather, you have discussed the facts of your testimony
13 with Mr. MacDonald on several occasions, haven't you?

14 A Yes.

15 Q And you knew the questions, as is normal
16 trial preparation, Mr. MacDonald was going to ask you
17 today?

18 A Yes.

19 Q You knew he was going to ask you questions
20 and discuss the facts involving the eight loans?

21 A Right.

22 Q You knew Mr. Sasso had taken care of the
23 details, didn't you?

24 A Right.

25 Q And you knew your memory and actual facts

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~~A~~ 337 Marshall-cross

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of handling these transactions were somewhat sparse,
is that true?

A Right.

Q Did you call Mr. Sasso and get the facts
that he knew about these loans?

A I called him, oh, maybe a year or two years
ago when I was testifying before the SEC to get the
facts, before I saw the actual files, naturally.

Q But you are here before the jury and the
court now. Did you make an effort to call Mr. Sasso
so you can find out about the missing details that
you know nothing about?

A No.

Q Were dummy notes used in connection with
these notes?

A Not to my knowledge.

Q Did anyone else in the bank use dummy
notes?

A Not that I know of.

Q Would any other officer of the bank use
dummy notes?

A I wouldn't know that.

Q You were the only one who used dummy notes
in the bank?

1 hpa26

Marshall-cross

2 for your attention?

3 A I would say these were copies.

4 Q Why were they held for your attention, do
5 you know?

6 A No, I do not.

7 Q Did there come a time when you had, to
8 your knowledge, some dummy notes for these people other
9 than the three that I mentioned to you and you had
10 to replace them with regular notes?

11 MR. MAC DONALD: Objection.

12 THE COURT: Sustained.

13 Q You never discussed making dummy notes
14 in this file with Mr. Stirling, did you?

15 A No, sir.

16 Q Did Mr. Sasso ever have anything to do with
17 Government's Exhibit 291, the letter you say is Mr.
18 Stirling's guarantee?

19 A I don't know that positively.

20 Q You don't know that?

21 A No.

22 MR. GAYNOR: I have no further questions,
23 your Honor, at this time.
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"Q But they just came in and spoke to you?

"A Probably one of them called me and asked me to loan so-and-so money, and I said yes.

"Q Without getting a financial statement?

"A Yes.

"Q Without knowing where the person lives?

"A I have made loans all my life doing that.

"Q Without knowing where the persons lives?

"A I don't think I went that far.

"Q Well, would it surprise you if you didn't know where these people live?

"A Would it surprise me?

"Q Yes, s ir.

"A No.

"Q That is not unusual?"

Then the investigator interjected an additional question:

"Q Let me ask you this, Mr. Marshall.

As I understand it, Mr. Yanowitch or Mr. Stirling came in to you and asked if you would make a series of loans to individuals secured by Stirling Homex stock; is that right?

"A Yes.

"Q And you said that you would?

1
2 that.

3 "Q You were the bank officer handling
4 this matter and you were making the decisions.
5 Now, why would you assume that you would require
6 a guarantee from a party you knew in making loans
7 to individuals you had not met?

8 "A Because obviously I didn't know these
9 people.

10 "Q Do you know if such guarantee was made
11 in writing, or was it oral?

12 "A I don't remember if it was in writing
13 or not.

14 "Q If such guarantee was made, would it
15 become part of the bank's files?

16 "A Yes.

17 "Q That was usual procedure?

18 "A Yes.

19 "Q Do you recall the number of shares
20 involved?

21 "A No, I do not."

22 Then they asked you about some general proced-
23 ures in making loans. Then, on page 263 the following
24 occurred beginning at line 10:

25 "Q You made no inquiries about their back-

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Marshall - redirect

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"A Yes.

"Q What about during that time?

"A I am sure there were addresses in the records some place, and I am sure there were notes signed by these individuals.

"Q You are sure but --

"MR. HERLIHY: You can picture these in your mind today?

"THE WITNESS: Yes, and I know there was a note that had to be signed."

I guess the question is:

Do you recall giving those responses to those questions?

A Yes.

Q Do you recall Mr. Gaynor's questions this morning about the Executive Committee minutes which you had previously examined in connection with this series of loans and Mr. Stirling's guarantee?

A Right.

Q I show you what has been marked as Government's Exhibit 1043 for identification and I have it open to a page which bears the date 1/26/71 in the upper right-hand corner and ask you, sir, if you can identify that page, the kind of document that appears thereon? What is that

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Marshall - redirect

2200

1
2 paper?

3 A This is a loan presentation submitted to
4 the Executive Committee of the --

5 Q What Executive Committee?

6 A Of the bank.

7 Q Which bank?

8 A Central Trust, which gives the line approval,
9 the present debt --

10 MR. GAYNOR: I object to this being read.
11 I don't believe that is in evidence. The witness is
12 reading from it.

13 THE COURT: Do you want to offer it?

14 MR. MacDONALD: Yes, we do.

15 MR. GAYNOR: No objection.

16 (Government's Exhibit 1043 was received in
17 evidence.)

18 THE COURT: Now you may read from it.

19 Q Why don't you explain to the members of the
20 jury what is in the first box, then the second box, then
21 the third box, and you may read the elements that are
22 inside of the boxes with appropriate explanations.

23 A This is a loan presentation sheet given to
24 the Executive Committee which lists the name, the debts,
25 the lines that are approved, and then down underneath it

xx

mcs

Marshall - redirect

David Stirling.

And also an unlimited guarantee of David and William Stirling and H. Sibley Jr. on all of this.

MR. MacDONALD: We have no further redirect.

MR. GAYNOR: May I proceed, your Honor.

THE COURT: Yes.

xx

RE CROSS EXAMINATION

BY MR. GAYNOR:

Q Mr. Marshall, I asked you earlier if you could explain why there were not promissory notes for all of these individuals in the file. Do you remember that?

A In which file?

Q The bank's files that you were shown by me.

A I don't know why they are not in there.

Q You don't know?

A No.

Q When Mr. MacDonald read to you a moment ago your previous testimony he read you on page 269, line 10, he is asking about these loan transactions and he says:

"Q What about during that time?

"A I'm sure there were addresses in the record some place and I am sure there were notes signed by these individuals."

So it is a fact, sir, that you weren't sure at

mcs

Marshall - recross

1 all that they were signed notes by these individuals,
2 were they?

3 A Not until I was given the bank records to see.

4 Q Are there in there now signed notes by all of
5 thes. iduals?

6 No.

7 Q Let's see these Executive Committee meeting
8 notes here, Mr. Marshall.

9 A You want the one I was reading from?

10 Q No, let me just ask you some questions
11 generally.

12 Please keep your voice up so the whole jury
13 can hear you and his Honor too.

14 Now, an Executive Committee is a committee of
15 the bank officers who are on that committee?

16 A This is the directors. The Executive
17 Committee of the directors, not of the officers.

18 Q And they held meetings, did they not?

19 A That is right.

20 Q And loans that came before the bank were
21 processed and discussed by that committee?

22 A That is right.

23 Q How often did you meet?

24 A Well, the Executive Committee met every week.
25

mcs

Booth - direct

2322

1 statements?

2 A Yes.

3 Q And thereafter did you receive a writing with
4 respect to that immunity?

5 A Yes, I did.

6 Q I hand you Government's Exhibit 991 for iden-
7 tification.

8 Is that the writing that you just referred to
9 or a copy thereof?

10 A Yes.

11 Q What is your understanding of the condition
12 or conditions under which you received immunity from
13 prosecution for past false statements or perjurious state-
14 ments?

15 A May I read the last line to describe that
16 understanding?

17 MR. MacDONALD: If there is no objection, I
18 would like you to read the entire exhibit.

19 THE COURT: All right, go ahead.

20 (Government's Exhibit 991 was received in
21 evidence.)

22 A It is addressed to my attorney, Leroy T. Ramsey,
23 600 Wilder Building, Rochester, New York.

24 "Re: Judith Howard Booth.

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Booth - direct

"Dear Mr. Ramsey:

"This is to confirm our telephone conversation today during which I reconfirmed that I have previously assured your client and her husband on or about November 19, 1976, that she would receive immunity from prosecution for perjury, false statements or any other crimes connected in any way with the Stirling Homex Corporation. The only condition is that your client must testify truthfully in the future and any future false statements would be a sufficient ground to vitiate this agreement.

"Very truly yours,

"Robert B. Fiske, Jr.

"United States Attorney,

"By W. Cullen MacDonald,

"Assistant United States Attorney."

MR. MacDONALD: We have no further questions on direct examination.

MR. GAYNOR: May I proceed, your Honor?

THE COURT: Yes.

MR. GAYNOR: Your Honor will recall that we had a conference at our last break and I have just been shown a page. May I have a moment to read it?

THE COURT: Surely.

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Kesel-cross

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outside auditors?

A When I started working for the company the account was already on the books and it was our policy to take a physical inventory of the raw material every month and we would show the increase or decrease of the inventory through that account.

Q Were you the person who actually reversed that entry during one of the Harris, Kerr, Forster audits?

A Yes, I probably was.

Q You understood that that entry was to be reversed before the final financial statements were made public, you understood that, didn't you?

A Yes.

Q There was never any intention to keep a fictitious entry on the books, was there?

A No.

Q Do you have 353A in front of you?

A No.

Q Now, you testified on your direct examination that you were able to tell that there had been a sales reversal on that particular page. You were able to tell that, were you not, because near the bottom, where it says "Explanation," you wrote down at

1 jpa Kesel-cross 2473
2 the time:
3 "(A) To reverse invoices 10-145 and
4 10-147 on JR" -- and that's a reference to a journal
5 page, is it not?
6 A Yes.
7 Q -- "JR10-127 (10-252 and 10-254)."
8 It was the existence of that explanatory
9 footnote that enabled you to tell Mr. MacDonald that
10 that was a reversal of a sale, isn't that right?
11 A That's correct.
12 Q And you made similar explanatory footnotes
13 on the other journal pages when you reversed a sale,
14 isn't that right?
15 A Yes.
16 Q Now, do you remember that Peat, Marwick
17 & Mitchell came to the premises of Homex in Avon,
18 New York and conducted an audit first for the period
19 ending February 28, 1970 and then they came back and
20 did another audit for the period ending July 21, 1971?
21 A Yes.
22 Q Am I correct?
23 A Yes.
24 Q And on those occasions auditors from Peat,
25 Marwick & Mitchell came and looked at the journals, did

jpa

Kesel-cross

2474

they not?

A That's correct.

Q Do you recall whether or not the auditors from Peat, Marwick, upon looking at these sales journal pages, asked you for any supporting documents about any of these sales? Do you remember that one way or the other?

A In the course of auditing the books, if there is information that the journal entry itself does not reveal, it is usually the practice of the auditors to ask for that backup.

Q On the basis of that practice is it your best recollection that any of the auditors from Peat, Marwick in fact did ask you questions about the sales, questions about supporting documents?

A They probably did.

Q And you didn't feel under any instructions, if you had the supporting documents in your office, to give it to them, isn't that correct?

A I was told that if the auditors asked any questions about the sales, that I was to refer them to Ed Schulz.

Q Let me read from your testimony before the Securities and Exchange Commission at page 43, line

1 jpa

2 your occupation, sir?

3 A I live at 42 Crest Drive, South Orange,
4 New Jersey. I'm a professor at the Graduate School
5 of Business Administration of New York University,
6 professor in accounting. I also have an outside
7 accounting consulting practice.

8 Q Where did you practice accounting?

9 A In South Orange, Nersey, at 358 South Orange
10 Avenue.

11 Q I would like to direct your attention to
12 on or about September 22, 1970 and ask you if you had
13 occasion to meet Edwin Schulz for the first time to
14 discuss certain Stirling Homex accounting matters?

15 A I had occasion to meet with Mr. Schulz
16 at that time.

17 Q Would you tell the members of the jury, please,
18 your recollection of the discussion on that day?

19 THE COURT: When is this?

20 MR. MAC DONALD: 9/22/70, your Honor.

21 THE COURT: Thank you.

22 A My recollection is that I met Mr. Schulz
23 at the office of Mr. Hillman, who was counsel for the
24 company, to go over the characteristics of operations
25 of Stirling Homex and to discuss the method of reporting

cs3

Mauriello - direct

1 Reuben K. Davis in connection with a land sale opinion
2 which you prepared?

3 A Yes, I received this letter. It is
4 addressed to me.

5 Q Thereafter did you prepare and issue two
6 memoranda opinions with regard to that land sale trans-
7 action?

8 A Yes, I did.

9 Q I would like to direct your attention to on
10 or about January 6, 1971 and ask you if on that day you
11 traveled to Avon, New York and attended a meeting in
12 connection with the same transaction?

13 A I recall having made a trip to Avon, New York,
14 yes.

15 Q Who attended that meeting and where did it
16 take place, to your recollection?

17 A To the best of my recollection, Mr. Davis
18 and Mr. Schulz and Mr. Yanowitch -- I met with them on
19 that date.

20 Q I would like to hand you Government's Exhibit
21 674 and ask you if you can identify the handwriting on that
22 exhibit, please.

23 A This is my handwriting with reference to the
24 accounting of the Securities and Exchange Commission
25

cs4

Mauriello - direct

1 thinking on the reporting of the profit on land sales.

2 That is one aspect.

3
4 The other aspect are notes that I made that I
5 thought constituted points that should be inquired into
6 with respect to the appropriate reporting of any gain on
7 the sale of that land.

8 Q Will you tell the members of the jury if some
9 portion, perhaps refer to it by number, of those notes
10 relate to a meeting that you attended on January 6?

11 A My notes were a combination of thinking that
12 proceeded from an SEC accounting series, Release No. 95,
13 and also my own thinking with reference to the reporting
14 of profit. The notes indicate that I was concerned
15 with what was the financial strength of the buyer --
16 how --

17 Q Are you looking at 67173?

18 A Yes, 67173. I wanted to know how certain
19 was the value, was there any retention of effective control
20 by the seller, was there any indirect financing or con-
21 current loans made to the buyer by the seller, what was
22 the amount of the down payment, what escape clauses were
23 present whereby the buyer might be able to walk away
24 from the contract without any great financial injury, and
25 with regard to the buyer, what is to be done with the land.

cs5

Mauriello - direct

2577

1 cs5
2 There are quite a few questions.

3 Q I think you referred to one which you said
4 was incorrect financing or concurrent loans to the buyer.

5 A Yes, I did. That is my Point No. 4 on this
6 sheet of paper.

7 Q Tell the members of the jury what, if anything,
8 you remember saying in that regard having said to you
9 by anybody else in attendance on that occasion?

10 A I was concerned whether the buyer was
11 unrelated to the seller. This is the point contained in
12 the SEC release. In other words, we did not want a
13 buyer to buy who was related to the seller that might cast
14 reflection on the bona fides of the transaction, and we
15 did not want the buyer to obtain money through the
16 auspices of the seller one way or another by either
17 guaranteeing bank loans and that sort of thing. That was
18 the gist of that, and in my memo I believe I talk about
19 an unrelated purchaser because I was told that the
20 purchaser was unrelated.

21 Q I place before you, Professor Mauriello,
22 Exhibit 680 in evidence and ask you if you were the author
23 of that three-page or four-page memorandum on Stirling
24 Homex' stationery?

25 A This is a four-page memorandum, Exhibit 680,

1 cs6 Mauriello - direct

2 which I dictated. It is not my office typewriter.

3 I dictated it on the matter of the sale and my recollection
4 is that this was dictated up at Avon, New York.

5 Q Would you read to the jury the first sentence,
6 please? I believe that includes a reference to the
7 affiliated status of the buyer.

8 A Yes, I used the word unrelated before, but
9 in the memorandum -- this is a prelude to another memo,
10 but the wording, I believe, is the same. I, in my
11 opening sentence, dictated this:

12 "Regarding the sale by Stirling Homex to
13 Route 57 & 31 Development Corporation, and
14 unaffiliated purchaser, the undersigned believes
15 such transaction to be a bona fide sale whereby
16 the gain determinate under general accounting" --
17 I think the word should be determinable --
18 "under general accounting procedures should be
19 reflected as of the date of sale of December 30,
20 1970."

21 Q I would like to direct your attention forward
22 in time to the latter weeks of January 1971 and ask you
23 if you had occasion to be consulted once again with
24 respect to several accounting issues which were then
25 the subject of discussions with Homex and its auditors.

cs7

Mauriello - direct

2579

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A Yes, they were, yes.

3

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Q I show you Government's Exhibit 665 in evidence and ask if you have a recollection that you received those documnts in that connection?

6

A Yes, I received these documents, yes.

7

8

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Q Would you read the caption and the subject at the top of the document, who authored it and who was it addressed to and the subject to which it relates?

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A These are dated January 21, 1971 and they are from Edwin J. Schulz to Harold M. Yanowitch, copies of which were furnished to me. There are two memoranda here and they are concerned with accounting issues concerned with the operations of the company, and they are both really relating to facets of accounting policies depending upon the particular issue, whether it be product development, plant relocation, plant expansion, application, the percentage of completion concept which was the subject matter of the first opinions, and so on, so it was a generalized summation of the accounting that pertained to major items or operations of the company.

Q Professor Mauriello, in that same time period, that is, the latter days of January 1971, did you have a discussion with anybody connected with Stirling Homex concerning your consulting William Murray of Peat,

cs8

Mauriello - direct

1
2 Marwick & Mitchell as to the land transaction which you
3 have previously referred to?

4 A Yes, I recall meeting with Mr. Murray.
5 Mr. Yanowitch, as I recall, indicated to me -- asked me
6 whether I knew of any -- any of the Big 8 accounting firms
7 or important members of such firms because the company was
8 contemplating a public issue of stock and that the
9 brokerate house that would support that issue felt that
10 the company should have a Big 8 firm, one of the large
11 eight firms in accounting know as the Big 8, and the
12 accountants at that time were not in that Big 8 category.

13 Q On or about February 2, 1971 did you have
14 a meeting with William J. Murray of Peat, Marwick &
15 Mitchell in that connection?

16 A Yes, I had a meeting with Mr. Murray really
17 in terms of a generalized discussion on how he felt about
18 this particular land sale.

19 Q Will you tell the members of the jury what you
20 recall of that discussion on that occasion?

21 A Well, I summarized orally for Mr. Murray, as
22 I recall -- I summarized the features of the particular
23 land transaction as it had to be formulated at that point
24 and he seemed sympathetic under the facts as I presented
25 them to him that the reporting of gain would be appropriate.

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Q Did you thereafter prepare a more extensive memorandum opinion on the subject of the land transaction?

A Yes, I did.

Q I would like to show you page 9902c of Government's Exhibit 580 and ask you if that is the opinion which you prepared on or about February 3, 1971?

A Yes, I prepared this opinion.

Q Do you remember, Professor Mauriello, attending at the offices of Shea, Gould, Climenenko & Kramer here in York City shortly after preparation of that document for a scheduled meeting with Harris, Kerr, Forster?

A I recall that.

Q Tell the members of the jury who was present prior to the scheduled time the meeting was to commence?

A We met in the office of the law firm you mentioned, She Gould, Climenko and so on, and, if I recall that, Mr. Davis, Mr. Schulz were there. I also seem to recall that Mr. Yanowitch was there. I was there and Mr. Kramer of the law firm was also there.

Q Did you have the opinion which is before you in your hands with you on that occasion?

A I recall that I did, yes.

Q Will you tell the members of the jury what

1 csl0

Mauriello - direct

2 happened with respect to the Harris, Kerr, Forster concern
3 at that meeting?

4 A We were in the office of the law firm.
5 I4 was an afternoon meeting, and I bielieve the meeting
6 was scheduled for two o'clock, but at some early point in
7 the afternoon, a representative or representatives from
8 Harris, Kerr, Forster -- there was a call to the effect
9 that they were unable or they were not going to make the
10 meeting -- which one, I don't know, but they were not
11 going to make the meeting and therefore 4thre was no
12 meeting that afternoon.

13 Q I would like to direct your attention forward
14 in time to on or about February 10, 1971 nd ask you if
15 on that evening you had occasion to meet with Mr. Murray
16 of Peat, Marwick & Mitchell at your home in Orange, New
17 Jersey to discuss the land transaction further?

18 A Yes, Mr. Murray came by my home that evening.
19 He also had an associate with him from Peat, Marwick &
20 Mitchell and we discussed further the features of this
21 land sale from the standpoint of what should be the legal
22 provisions that would make this sale a bona fide sale
23 whereby gain could be reflected.

24 Q I would like to show you Government's Exhibit
25 671 and ask you if that is a memorandum opinion which you

csll

Mauriello - direct

2583

prepared on or about February 8, 1971 again with reference to this same land transaction?

A Yes, this is another of the memoranda, yes.

Q Does that bear some handwritten material penciled on it on the first page, the second full paragraph --

A Yes, there is some handwritten material indicating what changes should be made in the interests of a concluding memorandum that would express the combined thinking of Murray and myself with respect to, you know, a legitimate picking-up of profit.

Q In your recollection refreshed concerning some portion of the discussion that evening about title to a 15 or 5-acre parcel and what if any relationship it had to the transaction?

A Yes. In a memorandum dated February 3, the earlier one we referred to, we were talking about title to 15 acres having been transferred. That was then changed to five acres, and then even the five acres was eliminated on the ground -- on the basis that if there were any transfer of title in coordination or concurrent to a certain down payment, that such a transfer of title might not be advisable in that the buyer making the down payment would take the acreage involved in the transfer

1 csl2 Mauriello - direct 2584
2 of title and then just default on the rest of the contract,
3 and that would be improper in the sense that we had no
4 right to pick up the gain on the sale of the total
5 acreage.

6 Q Do you recall communicating with anyone
7 from Stirling Homex with respect to the reduction of the
8 amount of acreage for which title would be transferred?

9 A We were in a study at my home that evening. It
10 was about 9.30, 10 o'clock by that time. Mr. Murray
11 came by at around 9 o'clock, and my recollection is hazy
12 as to whom I ta'ked to. I seem to recall that I talked
13 to either Mr. Schulz or Mr. Yanowitch. All my telephone
14 calls were collect so that my telephone bills did not
15 indicate such call, but that was my best recollection,
16 that I did talk on the phone to either Mr. Schulz or
17 Mr. Yanowitch.

18 Q Thereafter, directing your attention to on or
19 abo ut February 20, 1971, did you have occasion on that
20 Saturday to meet with Mr. Murray in your offices in Orange,
21 New Jersey and did you discuss with him certain Stirling
22 Homex accounting procedures?

23 A That was in South Orange, New Jersey.
24 Yes, I saw MR. Murray on -- this was a Saturday morning
25 and I saw Mr. Murray that Saturday morning and I did have

cs13

Mauriello - direct

2585

1 a packet of the policies as they were pursued by or
2 adopted by Stirling Homex and I went over those policies
3 generally with Mr. Murray.
4

5 Q I hand you Government's Exhibit 809 in
6 evidence and ask you if you can identify that as another
7 copy of one of the documents you referred to as being
8 discussed on this occasion?

9 A Yes, this is a statement of accounting policy
10 that had been prepared at Stirling Homex dated February 18,
11 1971, at the end of this and dated February 19 on the title
12 page here; but these generally constitute a summation of
13 the accounting policy being followed by the company, and
14 this was delivered to me, as I recall, by hand on the
15 Friday preceding that day.

16 (Continued on next page.)
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jpal

Mauriello-direct

2586

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2 Q Following your conference with Mr. Murray
3 did you have occasion to communicate to anyone at
4 Stirling Homex the discussion in whole or part that
5 you and he just had?

6 A My recollection was that I was able to indi-
7 cate to either -- probably Mr. Schulz, my recollec-
8 tion is it was to Mr. Schulz -- but I indicated that
9 Mr. Murray of Peat, Marwick, Mitchell was in general
10 accord with the policies and accounting principles that
11 were being followed by the company.

12 Q What happened next in this connection?

13 A Pursuant to that telephone conversation
14 Mr. Schulz met with Mr. Murray and myself the following
15 day, which was a Sunday morning.

16 Q Where did that meeting take place?

17 A That meeting took place at my home.

18 Q What was the discussion on that occasion?

19 A The purpose of that meeting was for Mr.
20 Schulz to meet Mr. Murray. He had not met Mr. Murray
21 prior to that date. There was a meeting on the
22 part of both persons.

23 Q Can you recall any portion of the content
24 of the conversations as it related to Stirling Homex
25 accounting matters and not social amenities?

jpa2

Mauriello-direct

2587

1 jpa2 Mauriello-direct 2587
2 A Well, I did know from the Saturday meeting
3 that Murray was pretty well in accord. I don't recall
4 the specific nature of the discussion between Murray
5 and Schulz.

6 Q I hand you government's Exhibit 670 in evi-
7 dence, as well as Government's Exhibit 394, and ask
8 you, first of all, can you identify 670 as your working
9 draft of the opinion in respect to the land sale
10 as it was being prepared in that portion of February,
11 1971?

12 A Yes. This was the final memorandum with
13 regard to the sale of this Clay land. This is the
14 final memorandum, yes.

15 Q Now, would you look at the attachment to
16 the other exhibit which I have placed before you.
17 Is that 394?

18 A 394.

19 Q And is the attachment signed by you under
20 date of February 18, '71?

21 A The attachment is signed by me, yes.

22 Q Is it your memory that you delivered the
23 ribbon original of your final opinion to Mr. Murray
24 in Orange, New Jersey or Newark, New Jersey?

25 A It is my recollection that I delivered it

1 jpa20

Mauriello-direct

2 the matter of signature, if it arose at all, arose.

3 Q Now, following that occasion of the interview
4 in the U. S. attorney did you, through counsel, solicit
5 and receive certain assurances of immunity concerning
6 your prior statements in this connection?

7 A That is so.

8 Q Do you understand that the immunity which
9 you received is conditioned upon future truthfulness
10 in all respects?

11 A Yes.

12 MR. MAC DONALD: We have no further direct
13 examination.

14 MR. EATON: Could we take a recess at
15 this time, your Honor.

16 THE COURT: Let's take about 10 minutes.
17 (The jury left the courtroom.)

18 THE COURT: Any problems with this re-
19 cess?

20 MR. EATON: May I ask when your Honor
21 intends to stop today?

22 THE COURT: I think about 5. Can we
23 finish this witness by then?

24 MR. EATON: I'm not sure.

25 THE COURT: Well, I would like to finish

1 jpa21 Mauriello--direct 2606

2 with him. So let's see how we go.

3 (Recess.)

4 (In open court.)

5 MR. MAC DONALD: Judge, I overlooked
6 three additional questions if your Honor would permit
7 we would like to be able to add to his direct examina-
8 tion.

9 THE COURT: All right.

10 BY MR. MAC DONALD:

11 Q I would like to read beginning at page 32,
12 line 5, from Mr. Schulz' testimony before the grand
13 jury on July 16, 1976.

14 "Q And there came a time, did there not, when
15 in the late spring and early summer of 1970 you had
16 a conversation with David Christman about a short fall
17 of a half million dollars with respect to that pro-
18 jected profit?

19 "A Yes.

20 "Q Mr. Christman was an assistant controller, or a
21 manager of accounting for the installation division
22 of Stirling Homex?

23 "A Yes.

24 "Q And that division kept its own set of books,
25 although they may have used the same computer that

jpa

Mauriello-direct

2607

1 Stirling Homex used?

2 "A Yes.

3 "Q And one of Mr. Christman's jobs was to calcu-
4 late on a percentage completion basis the revenues
5 to be reported and the cost of goods sold or cost
6 of installation to be reported for that division?
7

8 "A Yes.

9 "Q It is the fact, is it not, that he had per-
10 formed those calculations in the winter of 1969, '70
11 for use at that time in providing firm figures to you
12 for inclusion in the company's financial statements
13 in that period?

14 "A Yes.

15 "Q And he was bringing you the news that the
16 results of his having recently done them were a half
17 million dollars less than he and you had otherwise hoped
18 they would be, the bottom line result of profitability?

19 "A Yes

20 "Q You told him in substance, if not words,
21 that it would not be possible -- withdrawn.

22 "You told him in substance, if not words,
23 to delay recordation of the accounting entry embodying
24 that calculation that he performed until after the 1
25 close of the fiscal year, i.e., in August, and then

jpa

Mauriello-direct

2608

perform the calculation and make the appropriate accounting entry?

"A Yes."

Continuing at 33, line 18:

"Q Directing your attention to September, 1970, during that month and perhaps before and after it, you participated in a series of meetings and conversations with Harris, Kerr, Forster in respect of their decision to certify to the company's earnings for the second fiscal year ending July 31, 1970?

"A Yes.

"Q In part, those conversations included whether or not the fact that the company was no longer using the contract which included delivery to carrier as an important contractual event on which rights in the modules were said to be transferred from the seller to the buyer was discussed at length?

"A Yes.

(Continued on next page.)

T5 pm

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mcs

Mauriello - direct

2609

2

Q "Q And the contract which was then being employed in the second fiscal year in the main did not have such a provision and instead promised that a customer would become the owner of the dwelling when he received the keys and delivered a check after the thing had been completed and ready to be walked into?

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"A Yes, regarding the contract. However, that was not in the main. I think the totals for the year -- the turnkey contract represented less than 20 percent of total sales.

13

"Q For fiscal 1970?

14

"A Yes.

15

16

17

18

19

"Q At that time Joseph Mauriello was hired by the company to prepare memoranda in respect of the appropriateness of the accounting treatment which the company proposed to follow in regard to those module sales?

20

"A Yes.

21

22

23

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25

"Q It is the fact, is it not, that in the course of those discussions you did not reveal to the Harris, Kerr, Forster auditors the instruction that you had given to Mr. Chrisman about the accounting entry being delayed into August, relating to those

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Mauriello - direct

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computations which he had performed?

"A Yes.

"Q And you agreed that the auditors should have known that so they could have fairly appraised the appropriateness of the accounting method which was then being discussed?

"A Yes."

Q Mr. Mauriello, did you ever have disclosed to you such a \$500,000 delayed entry in respect of installation division profits in September of 1970 at the time you were writing your original turnkey opinion?

A No.

Q In respect to your opinions concerning the land sale, did you ever have disclosed to you the fact that David Stirling had priced and arranged to have assignment of condemnation proceeds to the bank making the loan to the purchasers to meet the down payment on that contract?

A No, that was not disclosed.

Q Did you ever have disclosed to you a history of reassignment of modules on the Stirling Homex books of account in accordance with the chart which I believe you have already seen in my offices and which is already on the record?

cs6

Mauriello - direct

2614

1 history of reassignments of modules?

2 A I'd have to know why there were reassignments.
3 If you had contract A and contract B with 5000 units
4 assigned to each and they would be delivered in -- or let's
5 say 5000 on B and they only produced 6000 units at that
6 point and B delivery was accelerated, then I can see an
7 assignment of 5000 from A to B because there wouldn't be
8 enough for B. But I would have to look into the facts.

9 If for example, we have continuing reassignments
10 I'd have to find out why, why weren't these contracts
11 being executed. Because then you think about it, if
12 these contracts weren't being executed there would
13 eventually be a cash paralysis and lack of cooperation
14 and collapse.

15 I would have to really look into that in
16 detail as to magnitude, was it recurrent, was it an
17 occasional thing, and really know, and the opinion that
18 I rendered had no reference to this because I was not
19 informed of the problem. I was not requested to write
20 on it.

21 Q With respect to the Mississippi opinion and
22 the history of involvement in formation and control of the
23 customer, what materiality would that have on the opinion
24 which you rendered?
25

jpa

Mauricello-cross

2637

1 Q -- on whether you do feel as a professor,
2 forgetting about this chart, do you feel that a company
3 which employs the policy of recording income when
4 modules, or whatever the product is, are manufactured
5 and assigned -- do you feel that such a company has
6 a right to wait until the final day of the reporting
7 period, whatever that reporting period is, and then,
8 if they want to, all in one minute plug in their sales
9 as they choose?
10

11 A I would say that a company has that right.

12 MR. EATON: I have no further questions.

13 MR. GAYNOR: Shall I continue, your Honor?

14 THE COURT: Yes.

15 CROSS EXAMINATION

16 BY MR. GAYNOR:

17 Q My name is Gaynor and I represent David
18 Stirling and William Stirling.

19 First of all, on the discussion of the
20 questions that Mr. Eaton asked you on this assigning
21 and reassigning modules, did you ever have a conversa-
22 tion with David Stirling about that?

23 A No.

24 Q Did you ever have a conversation with William
25 Stirling about that?

ps8

Levering - cross

2783

1
2 a plant shot, exterior shots and interior shots and
3 told how the modules were made.

4 Q Is it a fair statement to say that it gave a
5 pictorial review of the company's operation?

6 A I thought a very good one, yes.

7 Q Did you do it?

8 A Did I do it? I wrote the copy. I wrote
9 the narrative. The narrative was narrated by Ralph
10 Morris, CBS narrator in Boston whom I knew. The photo-
11 graphy was done by our own in-house photographer.
12 The film ran about 20 minutes.

13 Q You said it was a good one?

14 A It was a good one.

15 Q You directed it and helped produce it, is that
16 right?

17 A Yes.

18 Q Does it represent a fair representation of the
19 company's operation?

20 A Yes.

21 Q Now, isn't it a fact that you dealt with
22 Carl Wren concerning the details concerning the releases
23 on the Mississippi operation?

24 A That's correct.

25 Q You also testified something about a train, a

jps

Levering - cross

2787

1

Q Pardon me?

2

3

A I can't comment on that. I don't know if he was astute in that respect or not.

4

5

Q Do you remember what you told the SEC?

6

A No, I do not.

7

Q All right. We'll come back to that.

8

MR. GAYNOR: May I see Government's Exhibit 149?

9

Q Mr. Levering, you testified about Government's Exhibit 149, it being a chronology of Mississippi events.

11

12

Do you remember that or would you like to see it again?

13

14

A No, I remember it.

15

16

17

18

Q Now, this was evidently a memo from you from Richard G. Levering, Corporate Communications, Stirling Homex, and you directed copies of this to people, do you remember that?

19

I'll show it to you.

20

A I don't remember it, but I'm sure I did.

21

22

Q I direct your attention to the lower left-hand corner. You tell the jury who you directed those copies to?

23

24

A Carl Wren , Rubel Phillips, Wynn Mosely.

25

Q Did you direct one to William Stirling?

jps

Levering - cross

2788

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A I cannot recall that I did.

Q It doesn't show it on that exhibit?

A No, it does not.

Q I am showing you Exhibit 155, Mr. Levering,
which you testified about and I show it to you, sir.

Would it be fair to say that was an announce-
ment to the press regarding Mr. Dantzler no longer being
a member of the board of directors at Greater Gulf Coast?

A This?

Q Yes.

A No. This is a memo for the people concerned
with making up the letterhead.

Q People concerned with making up the letterhead?

A Yes. It was directed to Carl Wren and Wynn
Mosely.

Q Pardon me?

A It was directed to Carl Wren and Wynn Mosely.

Q Was it directed to Mr. William Stirling?

A He wouldn't be involved in that.

Q He wouldn't be. So there were things that
you did in your capacity as Director of Corporation
Communicators which you did not direct to William Stirling
or which did not require his approval, right?

A That's true.

34pm

1 jqwc 1

Rumley - direct

2 W I L B U R G A R Y R U M L E Y, JR., called as a
3 witness in behalf of the Government, being first
4 duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. MacDONALD:

7 Q Mr. Rumley, where do you live and what is
8 your current occupation, please?

9 A I live in Rochester, New York. I am currently
10 employed by Frank G. Raichele, Trustee, Stirling Homex
11 Corporation.

12 Q Prior to Mr. Raichele were you employed by the
13 Stirling Homex Corporation?

14 A Yes, sir.

15 Q When did you first begin your employment?

16 A The 10th of August, 1970.

17 Q In what department were you in and what was
18 your initial position?

19 A Scheduling coordinator, operations control.

20 Q When you arrived with Stirling Homex, did the
21 operations control department employ a computer in carrying
22 out its responsibilities?

23 A Yes.

24 Q In addition, did that department prepare certain
25 daily handwritten reports with regard to manufacturing and

1 jqwc 2 Rumley - direct
2 shipping and billing and assignments of modules?

3 A We did.

4 Q I would like you to direct your attention,
5 please, to the larger of the two documents -- I believe it
6 is 826 before you?

7 A Yes.

8 Q Can you identify that, please?

9 A This is a file binder that contains various
10 daily or weekly reports prepared by the operations control
11 personnel at the time of my arrival with Stirling Homex.

12 Q Did you thereafter begin the preparation of this
13 report on a daily basis as one of your responsibilities?

14 A Yes, during August 1970.

15 Q Have you located the place where your additions
16 take over from your predecessor?

17 A I have.

18 Q What date is that?

19 A On the 10th of August.

20 Q Can you tell the members of the jury at that
21 time the distribution of this report and perhaps you can
22 explain its overall purpose as you viewed it at that time?

23 A This report identified current projects by
24 project name and project number, the requirements of the
25 project by the total number of apartments, whether they be

1 jpal7 Rumley-cross

2 changes on file II.

3 Q Now, you used the words, and I believe you
4 also used it in your direct testimony of "valid assign-
5 ment." As far as you were concerned in your duties
6 in the operation and control department you con-
7 sidered a valid assignment only one where there was
8 an absolutely final site plan, isn't that what you
9 mean by valid assignment?

10 A Valid assignment --

11 Q Can you answer that yes or no?

12 A Yes.

13 Q Now, you are aware that there were at least two
14 large projects of Stirling Homex, namely, the Greater
15 Gulf Coast project and later the Stanley Simon projects,
16 which were entered in file I without final site plans.
17 You were aware of that, were you not?

18 A They were not entered in file I in toto.

19 Q They were entered under the terminology
20 "group," were they not?

21 A No, group represented cubes available for
22 assignment to a site plan. They were cubes in storage
23 not otherwise assigned to a valid site plan.

24 Q Well, let me put it this way. When you
25 received word of the reported sales to Greater Gulf

1 jpal8 Rumley-cross

2 Coast and to Stanley Simon, since they did not have
3 final site plans you assigned them -- you assigned modules
4 to them in file II, did you not?

5 A Yes.

6 Q But in file I you felt that an assignment
7 could not yet be made, isn't that correct?

8 A In file I it was impossible to be made.

9 Q Another aspect of file I was that if the so-
10 called final site plan were changed in some respect, for
11 example, the project might be even under construction
12 and the supposedly final site plan asked for two-bedroom
13 apartments on the corners of the street and the
14 customer or the local housing authority changed it to
15 three-bedroom apartments on the corner of the street,
16 that would require some work in your department, would
17 it not?

18 A After we received the site plan which
19 supported the changes dictated by the customer.

20 Q This happened after what you had made to be
21 a valid assignment to file I to what you thought to
22 be a final site plan?

23 A Yes, there were changes.

24 Q I think in my example the customer asked to
25 have some two-bedroom apartments cut out of his housing

1 jpal9 Rumley-cross

2 project. Isn't it a fact that those two-bedroom
3 cubes would stay in file I until that entire project
4 was completed?

5 A If they were cut out of a project?

6 Q Yes.

7 A Negative. We would take them at our next
8 updating session and we would delete them, from the
9 project of previous assignment and either assign them
10 to some other project that was -- that we had a new
11 site plan for or return them to the group, which would
12 be the common designation during most of this time
13 frame.

14 Q Mr. Rumley, do you recall that prior to
15 March, 1971 the manufacturing number that you plugged
16 into the computer did not originate in operations control
17 but was a number given to you from the other plant?

18 A That's correct.

19 Q And am I correct that the other plant is
20 another name for the site planning department?

21 A By that we meant the engineering and architects
22 and what have you who physically worked at plant 2 at
23 that point in time.
24
25

T6 pm 1

mcs

Rumley - cross

3082

2 Q Those engineers and architects assigned the
3 manufacturing number to each cube prior to March of 1971;
4 isn't that correct?

5 A A woman down there, and I don't recall her
6 name, maintained a manufacturing number register --
7 correction, maintained a project number register. After
8 March of '71 I maintained a manufacturing number register.

9 Q Well, then, I'm not sure exactly which number
10 I'm talking about, but let me see if this rings a bell
11 with you:

12 Do you recall that the architects and engineers
13 would prior to March 1971 change the number when they
14 changed some specification of the cube?

15 A Changed which number?

16 Q That is my question.

17 Do you recall that they changed a number?

18 A I can recall in the case of Bradford, which
19 would be after that -- I think the original work order
20 specifications were 71110, maybe, 71 being the first
21 written in October of 1971, and shortly after this we
22 received knowledge that the Bradford-University Pittsburgh
23 project at Bradord, Pennsylvania was to be known -- this
24 is a project number now -- as 71596, I believe, and at
25 that point in time there, it was still early enough to

mcs

Runley - cross

3083

1 catch the work order tickets to change them to 71596,
2 and the project was shipped and installed as 71956, if
3 I'm correct on that project.
4

5 Q My question, then, is on File 1. Whether
6 occasions on the same project would carry cubes under a
7 succession of different numbers because of changes in
8 the specifications which were being made by the engineers?

9 A Could you repeat that again so that I don't
10 lose any of it?

11 Q Did it often happen or did it happen on a
12 number of occasions with respect to File 1 that a project
13 would be carried along in file number and for a while it
14 would be carried under one project number and then
15 engineering or architecture would change the number
16 and then change it again and they would tinker with
17 specifications? Did that happen in File 1 that you
18 noticed --

19 A No.

20 Q --that the numbers assigned to the different
21 cubes or assigned to the different projects changed over
22 a period of time?

23 A If you are talking about the project number,
24 the project or the manufacturing number, that would not
25 change. The engineers might give us a site planning

mcs

Rumley - cross

3084

1 change: They don't need this building. This building
2 instead of four bedroom is two bedrooms, and accordingly
3 they would give us a new document, a site plan, and we
4 would make the necessary changes.
5

6 Q The number would change if the site plan
7 changed?

8 A The requirements for two-bedroom, three-bedroom,
9 four-bedroom, whatever, would change and the supporting
10 serial numbers on File 1 and/or File 2 would change,
11 but the project number remains the same.

12 Q Is this change in the number of two bedrooms
13 as opposed to three bedrooms sometimes called a change
14 in mix?

15 A It would be referred to as a change in mix;
16 yes, sir.

17 Q After March 1971 the numbers were assigned
18 not by the architects or the engineers but by you; isn't
19 that correct?

20 A The manufacturing number was, yes.

21 Q And you were the one who would decide which
22 cubes were reserved for which project, were you not?

23 A No, because after March 1971, with the
24 exception of a couple of projects that went the full
25 stream, produced for that project, shipped to that project

mcs

Rumley - cross

1 and installed in that project, everything was strictly
2 a manufacturing number, so that as it came off the line
3 naturally it would become a stock not assigned or a
4 group not assigned, not billed, and that then that became
5 the nucleus to which we assigned cubes against the subse-
6 quent site plans that would come down from engineering.
7 Then, on the computer file you would have the manufacturing
8 number that I had created, as it were, initially produced.
9 The project of assignment would have that same number,
10 the same as the manufacturing number.
11

12 Ultimately when we had everything on one
13 file the reserve column would also have that same manu-
14 facturing number. As we got a site plan assigned, that
15 cube to that specific project, the project of assignment
16 column would change. The manufacturing number would be
17 the original. The project of assignment would change
18 and in the case of the reserve it had probably changed
19 by that time to support either that project or something
20 that was on the sales summary.

21 Q You mentioned the reserve column. That was
22 a column on file too, was it not?

23 A After the time of merging both files we
24 opened, expanded the data fields on File 1 to show a
25 reserve and we had enough room for RSC'D, I guess.

MCS

Thun - direct

3090

Hollyrood Park?

A It was two phases, one, a portion that was already built that was owned by, I believe, the Stirling brothers and, two, a section to be built which was to be built by the Stirling Homex Corporation.

Q Who purchased Phase 1 and later Phase 2 from their respective owners?

A A partnership of which I was a general Partner purchased both the existing apartments and those to be built.

Q What was the name of that partnership?

A Hollyrood Park Associates.

Q Will you tell us, please, if the Stirling brothers were members of that partnership?

A They were members at the time the project was sold to me. I was not an experienced real estate investor and I was interested in having experienced people involved with it and I asked them whether they would stay on in a small interest, which they did.

Q Do you remember the size of that interest that the Stirling brothers retained in that partnership?

A I don't recall the exact amount, but it was somewhere between -- I think it was somewhere around 12 percent.

mcs

Q Will you tell the members of the jury if that was a limited partnership and, if so, what that expression means with respect to owning real property in that form?

A It was a limited partnership. A limited partnership is one in which the limited partners are passive investors. A general partner has the responsibility for running the project.

Q You were the general partner of Hollyrood Park Associates?

A Yes.

Q Would You try and project your voice a little louder, please?

A Yes.

Q Were other members of your family and associates the other limited partners who made up the entire partnership known as Hollyrood Park Associates?

A Yes.

Q At the time of Hollyrood Park Associates' acquisition of that apartment project, did it also obtain a contractual right of first refusal to adjacent property both on the front and side around the apartment project?

A Yes.

Q I would like to direct your attention to in or about May 1969 and ask if you had a telephone

MCS

Thun - direct

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conversation with David Stirling with respect to that right of first refusal, the contractual right of first refusal you have referred to?

A Yes.

Q Tell us what you recall, please, of that conversation?

A The conversation was with regard to the two parcels adjacent to the project on which we had first refusal. David Stirling called and said that they were going to sell the two parcels or they were interested in selling the two parcels and would I be interested in exercising the right of first refusal.

Q Is such a right of first refusal simply that once a price has been quoted you can buy at that price or forever lose that right and somebody else presumably could pick it up thereafter?

A That is my understanding of it.

Q Tell us your best recollection, please, of the approximate price that Mr. Stirling placed on those two parcels?

A I don't recall exactly. I think it started as a price for the two of them together or each of them individually. It was somewhere in the neighborhood of \$500,000 to \$700,000.

mcs

Thun - direct

3093

1 Q Following that telephone call, did you take
2 some action with respect to reviewing whether or not you
3 were interested in exercising that right of first refusal?
4

5 A Yes, I said that I would like to have some
6 time to respond to it, and with regard to one parcel,
7 which was for a shopping center, I engaged the services
8 of a New York consultant to see what they thought the
9 feasibility of it was, and they said that -- they advised-
10 against purchasing it and I notified Stirling Homex
11 accordingly with regard to that parcel.

12 Q Is that the front parcel, the parcel fronting
13 on the road adjacent to the apartment project?

14 A Yes.

15 Q How about the side parcel?

16 A The side parcel I said that I would be
17 interested in purchasing because it was, in effect, a
18 potential third phase of the apartment project.

19 Q Did you tell that to David Stirling?

20 A Yes.

21 Q Did you have some discussion with him with
22 respect to the price for that third parcel as raw acreage
23 alone or as it might be with improvements on it?

24 A The price revolved around raw acreage zoned
25 for, I believe, approximately 330 units.

mcs

Thun - direct

1 Q Do you recall telling Mr. Stirling something
2 about buying it without any units on it or buying it with
3 some units or the contractual right to units to be placed
4 thereon?
5

6 A I viewed myself, as I mentioned earlier, as
7 a real estate investor, not a builder, and I was interested
8 in the land only if the units could be put on top of it.

9 Q What did you say to Mr. Stirling in that
10 regard, if anything?

11 A I said that I would be interested in the units
12 if the -- interested in the land if the Stirling Homex
13 high-rise modules could be put on it, and we discussed
14 the fact that the package -- the price for the land and
15 the buildings would have to be one which worked economically.

16 He was unable to give a price for the units,
17 however, because the price list had not been published
18 yet.

19 Q Did you say something further with respect
20 to the proposal in the form of any purchase that you
21 might be willing to undertake?

22 A Because the price of the modules was not yet
23 published, I said that the purchase of the land would have
24 to be on a basis whereby it had more the characteristics
25 of an option on the land as far as I was concerned.

T7

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jpal

Thun-direct

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Q The mortgage note may bear identification

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number 43253 in that package of materials. Would you

4

turn to that page.

5

A I see a 43252 and a 43255.

6

Q For the jury's benefit, the total purchase

7

pruce was, was it not, \$325,000?

8

A Yes, I believe so.

9

Q And payment was made toward that by a

10

down payment of \$32,500 together with an assumption

11

of existing mortgages as well as a promise to pay Stirling

12

Homex's subsidiaries the balance in the form of purchase

13

money mortgage?

14

A That is correct.

15

Q Now, the purchase money mortgage itself

16

on page 2 states, does it not, that ~~"This note is~~

17

secured by a mortgage made by the obligor to the obligee

18

of even date herewith, on property site waited in the

19

County of Onondaga, State of New York. It is covenanted

20

and agreed that the obligee shall look solely and

21

exclusively to such mortgage for the payment of any

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sums due hereunder, and that any judgment entered or

23

recovered sums thereunder shall be limited to the

24

mortgaged premises and that no deficiency or other

25

personal judgment shall be sought or rendered against

1 jpa3 Thun-direct

2 high-rise apartments -- on the piece of land that you
3 were buying?

4 A This I believe is a preliminary draft of
5 a letter that was subsequently signed. I'm not sure
6 of the extent to which this accurately reflects the
7 letter that was ultimately signed. But in general
8 it would have been similar.

9 Q The handwriting on there is your attorney's
10 handwriting?

11 A I believe so.

12 Q Government's Exhibit 80 in evidence, the
13 final letter assigned, and does it embody the changes,
14 at least in part, that your attorney had penciled in?

15 A It appears to do so.

16 Q Mr. Thun, following the closing that you
17 described, at some point following the closing, did
18 you have a conversation with members of the Hollyrood
19 Park Associates limited partnership, other than the
20 Stirlings, concerning River Bend Estate, Inc. now being
21 the owner of this side parcel adjacent to Hollyrood
22 Park Associates?

23 A I'm not sure what you mean.

24 Q Did you tell the limited partners in Hollyrood
25 Park Associates something about this piece of land?

1 jpa4 Thun-direct

2 MR. GAYNOR: I object. We are quite a
3 ways into leading this witness. Can't the suggestion
4 be made as to a conversation and then have Mr. Thun
5 tell us what occurred in the conversation without
6 Mr. MacDonald testifying and making the statement.

7 THE COURT: I don't think he is testifying.
8 The question is whether he is leading. The objection
9 is overruled.

10 A Would you mind repeating the question.

11 Q Did you tell the other limited partners
12 in Hollyrood Park Associates that this purchase had
13 been effected where possibly phase 3 of the apartment
14 project might some day be placed?

15 A The partnership had periodic meetings of
16 the partners which the Stirlings did not attend.
17 At the partnership's meeting I did describe the parcel
18 of land and I did describe the potential for having
19 approximately 330 units placed on it. I did notify
20 the partners present that I was personally taking the
21 risk of purchasing the land and that if in the future
22 at some time the units were produced and they wanted to
23 add the land and the units to the existing partnership,
24 that I would let them do so at cost.

25 Q That cost being without profit to yourself?

jpa5

Thun-direct

A Without profit to myself.

Q I am handing you Government's 81 in evidence and ask if you can identify that as your check in payment of the portion of the obligation?

A Yes.

Q On 93A for identification, in the second page, which bears identification number 674, can you identify your signature?

A That is my signature.

MR. MAC DONALD: We offer 93A.

MR. GAYNOR: I have no objection, your Honor.

(Government's Exhibit 93A was received in evidence.)

xx Q Directing your attention, Mr. Thun, successively to the next four quarters following October 15, 1969, did you make successive payments against the principal or interest on this purchase money mortgage to Stirling Homex?

A I would have to see some specific -- I don't recall specifically which quarters were paid and which ones were not.

Q Have you produced -- withdrawn.

You were a member of another limited partner-

1 jpa

2 A Yes.

3 Q Now, Mr. Thun, I show you this map of

4 Hollyrood Park, and some of the writing is mine.

5 Would you just disregard that. Would you look at

6 the printing. This is in evidence, it is a govern-

7 ment's exhibit in evidence

8 Would you say that what I have drawn on

9 that blackboard inartistically and not to scale is

10 nevertheless a fair representation of this chart?

11 A With one exception. I would put this line in

12 to define Marcel M.

13 Q Great, you are right. I omitted that

14 line.

15 Now, how does that look?

16 A That's fine.

17 Q That's a fair representation?

18 A Yes.

19

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2 Q I direct your attention, please, to this
3 chart. Parcel E, when you came into the negotiations
4 for this property, had some buildings on it, did it not?

5 A It was fully constructed.

6 Q A fully constructed piece of property, which
7 was E. What did it have on it?

8 A 365 apartment units.

9 Excuse me, 355.

10 Q 355 units; correct?

11 A Yes.

12 Q By the way, who owned Parcel E?

13 A At the time that I was involved in purchasing
14 it?

15 Q Yes.

16 A I don't recall whether it was the Stirling
17 brothers individually or whether it was a company that
18 was owned by them, but --

19 Q It was a Stirling owned or Stirling Corporation
20 owned piece of property?

21 A It was not Stirling Homex.

22 Q It was not Stirling Homex. This was before
23 that; correct?

24 A That is correct, yes.

25 Q And the Stirlings had built that and developed

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that piece of property; isn't that a fact?

A Yes.

Q Sewers, utilities, houses -- it was a completed project; correct?

A That is correct.

Q Then you came and through one of your companies which company was it that you used to purchase Parcel E?

A I believe it was the law firm's closing corporation, and then it was purchased by the partnership.

Q It was a nominee corporation; right?

A Yes.

Q At the time you purchased E, Mr. Thun, did you receive any kind of a right or an option, if I may call it that, with respect to Parcels M and P?

A Perhaps I could put it in my own words.

At the time that I purchased the existing units in Parcel E, I purchased on a turnkey contract basis units to be built on Parcel P and at the same time received a right of first refusal on Parcels M and F.

Q We'll just take this one step at a time.

So that when you purchased E, when was that, sir?

A I believe it was early 1969.

Q Early 1969.

1 cs6

2 You had an option or right of refusal, whatever you call
3 it, as to M and F. You said no, you don't want M.
4 What did you do with F, insofar as you told David?

5 A I said that I would be interested in F, which
6 was zoned for, as I recall, 330 units, if a package of
7 Stirling Homex high-rise modules was put on top of it and
8 a purchase price with a combination of land plus buildings
9 worked economically.

10 Q Now, Mr. Thun, there was a very salient reason
11 for you wanting to purchase F, quite apart from that,
12 wasn't there?

13 A Yes..

14 Q What was that reason that impelled you to
15 go forward and say you wanted F?

16 A The parcel -- the boundary of Parcel F --

17 Q Am I indicating this correctly?

18 A Yes, from this point over here and --

19 Q And also along here (indicating)?

20 A Yes.

21 Q That is the boundary you are now referring
22 to?

23 A Some of the -- Hollyrood was planned as a
24 parcel including that land and some of the access roads
25 to some of the buildings run over that land, and the

1 boundary to that land runs just a few feet from the front
2 door of several of the buildings.
3

4 Q So, am I correct in saying that you had a
5 \$7 million investment in E and P; correct?

6 A Something in that neighborhood, yes.

7 Q Approximately?

8 A Yes.

9 Q And you were interested, were you not, in
10 protecting that investment in E and P by exercising this
11 option on F; isn't that true?

12 A That is correct.

13 Q And also since you did not have F, Mr. Thun,
14 P could have been adversely affected by access roads
15 and certain buildings along here; is that true?

16 A I was interested in both parcels because
17 of their adjacency to the large investment and because
18 that which was put on them would have definitely affected
19 the character of the apartment project itself.

20 TO make it clear, the bottom side of that is
21 the golf course and M is a road, so the boundaries are
22 really defined in large part by those two parcels.

23 Q Mr. Thun, if you had not, and I assume this
24 is a prime consideration, if you had not purchased F and
25 someone else had, your interest in P and ultimately in E

mcs

Thun - cross

3154

1 Exhibit 74, being the financial statement at closing
2 which reflected the real estate transaction of Parcel F;
3 am I correct?
4

5 A Yes.

6 Q And that transaction occurred, according to
7 this, on May 29; correct?

8 A Yes.

9 Q It was your expectation as a real estate
10 developer and manager to put ultimately downstream or
11 down the road some buildings on F; correct?

12 A That is correct.

13 Q When you purchased F in May of 1969, that was
14 an absolute outright purchase of Parcel F by you; is that
15 true?

16 A That is correct.

17 Q So that if ultimately you didn't agree on a
18 price of buildings or you didn't put any buildings on F
19 you knew at the time that you purchased F that it was a
20 final completed deal; is that true?

21 A If your question is if the buildings were not
22 put on F and if therefore the land did not have the value
23 to me, did I realize that I would lose the money that I
24 had put into it, the answer is yes.

25 Q So you made a business judgment at the time

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Q Did you take out your checkbook and write a check for \$90,000?

A No, I did not.

Q Was one of the things, in the group of things which David Stirling wanted to accomplish as you understood it, getting a confirmation signed in payment of arrearages on the Kece-River Bend mortgages that was then in a state of arrearage?

A I didn't clearly recall that when you first asked me the question, when you refreshed my memory it was one of the things that occurred.

MR. MAC DONALD: We have no further questions.

RECROSS EXAMINATION

BY MR. GAYNOR:

Q Mr. Thun, the conference between Boylan and Bartz, so far as you were concerned, Mr. Boylan was acting as your attorney, right?

A That is correct.

Q The purpose of the physical meeting was to finally resolve the disputes, whatever they were?

THE COURT: No, I will not allow that as recross.

Q It wasn't your check for \$95,000 but it

hba

was Mr. Doerge's is that right?

THE COURT: That's right. That is not proper recross.

Now, please, this is recross examination and I would like you to confine yourself to the scope of the redirect.

MR. GAYNOR: He was asked if it was his check.

THE COURT: I know what he was asked. Now you may ask a question subject to that ruling.

MR. GAYNOR: I don't know how to do that, your Honor, other than ask him if it was Mr. George's check.

THE COURT: No, I will not allow that. Anything else with this witness?

Thank you, Mr. Thun. You are excused.

1 jpa4 Murray-direct

2 clear recollection of meeting with Mr. David Stirling
3 or Mr. William Stirling on those two days.

4 Q Directing your attention to Thursday, the
5 18th, would you tell us if you met with Mr. Schulz on
6 that day and, if so, tell us what you recall of the
7 discussion as it took place?

8 A The major area of discussion that I had
9 initially was in relation to the 1971 land sale.
10 That's the subject matter of my opinion letter here.
11 In the course of that, as I mentioned earlier, there
12 was still one tentative, open item that still had to
13 be resolved. That was a question of a concept
14 of imputation of interest.

15 Q What is that?

16 A Maybe if I can get it down into some simple
17 words. If I lend you \$10 and I say, "Okay, in 10
18 years you pay me back that \$10," and all you have given
19 me back at the end of 10 years, you have given me back
20 \$10. Now, I haven't lost any money in principal.
21 But I have sure as heck not earned any money on it.
22 If I took that \$10 and put it in the bank it would
23 have accumulated interest on it.

24 In the transaction that involved Route 57-31
25 Development Corporation there was an interest factor

jpa5

Murray-direct

1 that was minimal on the note. An accounting rule
2 says if you are lending somebody money or getting
3 involved in a transaction which involves a long-term
4 debt you have a right to earn interest on that transac-
5 tion. If the interest is zero is not enough you
6 impute, you make a calculation for accounting purposes
7 to say that, okay, fine, I am going to earn this
8 interest of a reasonable amount over the life of that
9 note, and that's what this is. If you lend money
10 to someone and you get paid 10 years later, you
11 have lost -- you have had an economic loss in the sense
12 that you haven't earned money on money. That's what
13 the concept of imputation of interest was.
14

15 Q What did you say to Mr. Schulz with re-
16 spect to that principle in the Kabeth land transac-
17 tion?

18 A Well, I told him that in my view the amount
19 of the imputation of interest was pretty significant.
20 I believe it amounted to approximately \$200,000 after
21 taxes or 200 -- it was about \$310,000 before taxes.
22 It was a fairly significant amount in connection with
23 the recorded income for Stirling Homex for the seven
24 months ended February 28, 1971. I told him in my
25 opinion he had to impute interest on it. I made

hbs

Murray - direct

3293

Q Mr. Murray, I have overlooked an item.

I would like to direct your attention to the time period prior to your signing the April 21 registration statement on behalf of Peat, Marwick & Mitchell and ask if prior thereto you had had occasion to have a conversation with Mr. Schulz with respect to the capitalization of an \$832,000 item. If so, will you tell the members of the jury what you recall of that conversation, sir?

A At the end of March, probably around the 24th, 26th of March, somewhere in that time frame, a confirmation -- received a telephone call from my partner in Rochester who asked my advice as to what had occurred -- what should be done with respect to the results of a confirmation reply that he received. He told me that the confirmation of an \$832,000 contract receivable came back and on the basis of that reply, this account was not an account receivable. We had a discussion of that and based on our discussion, the discussion was made that this \$832,000 amount was properly capitalizable as construction in process, because it related to costs associated with the Mississippi plant which was then in the process of being constructed in the South.

Some time after that telephone conversation and I don't recall whether it was in a phone conversation

1 hbs
2 with Schulz or one of those meetings that I attended for
3 example, I know I was at a meeting with the underwriters
4 on April 1, although I have no clear recollection of
5 what occurred, but some time during that time frame between
6 the telephone call from Rochester and the signing of the
7 registration statement, I did have a discussion with
8 Schulz about the classification of it. That conversa-
9 tion just related to, you know, we pull this \$832,000
10 out of accounts receivable, we put it down in the non-
11 current assets, we put it down with fixed assets, that
12 reduces our reported working capital.

13 Is there any other way of doing it?
14 My recollection is that I just told him no, that is just
15 the way it has got to be, and he had said fine.

16 MR. FELDSHUH: I didn't get the last word.

17 A He had said fine, and that was the end of that
18 issue.

19 Q I am handing you Government's Exhibit 10 now
20 in evidence, and ask you if at my request you have
21 examined previously the consent page there as well as the
22 signature page to determine if you signed that amendment
23 to the registration statement?

24 A Yes, sir, I affixed the firm's signature to
25 the consent to the inclusion of our accounts report.

jpa7

Murray-direct

3313

change in date that you read before?

A It is the same preamble that I mentioned before. Would you care to have that read in context?

Q You can just read item 9 for yourself.

A "No knowledge of any circumstances which would affect the collectability of the following receivables: Raseac Realty, Inc., 320,000; Kece Association, Ltd., \$241,624; Worcester Housing Authority, Bridgeport Street, 329,500; total, \$893,124.

Q Now, did you personally participate in any conversations with respect to any of those three items in the course of the September, 1971 audit by Peat, Marwick & Mitchell, or was that handled by others?

A Any conversations that I had were not with Schulz, Yanowitch or either of the two Stirlings. It was with Horn or Woods.

MR. GAYNOR: Who?

THE WITNESS: Horn or Woods.

Q I am handing you Government's Exhibits 16 and 17 in evidence. I ask you respectively if they are the printed annual report of Stirling Homex and the 10-K containing -- of Stirling Homex filed with the Securities and Exchange Commission?

jpa

Murray-direct

3326

1 turns out to be in your judgment later from the evi-
2 dence. Is that clear to you?

3
4 MR. EATON: Your Honor, I have a further
5 objection. I believe that the question would be more
6 proper to ask the witness for his expert opinion rather
7 than to ask what would have happened.

8 THE COURT: I don't think that as a prac-
9 tical matter, in the circumstances of this case, there
10 is any genuine difference between those two. But
11 if you think there is you may cross examine about it
12 later. All right.

13 Q Mr. Murray, I would like you to consider
14 if it were established as a fact that David Stirling
15 told two of the principals of the 57 & 31 Development
16 Corporation that they would have no difficulty with
17 the transaction and that he would arrange financing for the
18 down payment of that transaction for them, whether,
19 if you had known that, that that would have had some
20 effect or affect upon your views.

21 MR. FELDSHUK: If it please the court, I
22 believe this is basically, no matter how it is called,
23 a form of summarization of the facts or of some part
24 of them. To say this is in the very nature of this
25 kind of question at this time is highly prejudicial

jpa

Murray-direct

3327

and I will object to it, may it please the court.

THE COURT: I will allow that and I will overrule you. But I will be even-handed and overrule Mr. MacDonald. I think you mean effect and not affect.

I will ask the reporter to read the question.

(Record read.)

A It may or may not have affected the amount of income that was recognized on the sale of land in 1971. It would have had some effect upon me in terms of relying upon the representations that were contained with respect to no interest, no dealings directly or indirectly with principals of 57-31 that were contained in the representation letter and also the representation with respect to the total lack of affiliation between the parties. But what the result of that would be, I don't know. It would require investigation.

Q I hand you Government's Exhibit 61 in evidence. My question is, if you had seen that letter what effect would it have had on your opinion?

A Do you mind if I read this, Mr. MacDonald?

Q Go ahead.

THE COURT: Would that question be meaningful to the jury. I myself have not memorized Exhibit

jpa

Murray-direct

3328

1 jpa
2 61. If the members of the jury know what it
3 says I guess it is all right.

4 Q It is a letter from Reuben K. Davis to the
5 First National Bank of Rochester, dated December 11,
6 I believe, 1970, relating to the assignment of the
7 condemnation award proceeds to that bank.

8 A Well, if I had known -- if this had been
9 part of the transaction several things would have
10 occurred.

11 One, no income of any amount to have been
12 reported on the 57-31 land sale.

13 Two, disclosures in the financial state-
14 ments would have to be made that assets of Stirling
15 Homex have been impaired as a result of this.

16 And, thirdly, I would have difficulty with the
17 management letter, with the affirmative representations
18 of the chief executive officer and the senior finan-
19 cial man as to whether or not any assets had been pledged
20 or not.

21 Again, but those three things would have
22 happened.

23 Q I hand you Government's 395A for identi-
24 fication and ask if you could more specifically read to
25 the jury the specific representation which you just

jpa

Murray-direct

3329

1 had reference to over the signature of David Stirling
2 and Mr. Schulz in that March 22, '71 letter.
3

4 A It says:

5 "2. No assets pledged or assigned as
6 security for liabilities, performance of contracts,
7 etc., except as noted in note 8 of the financial
8 statement."

9 In effect, they assigned their right to
10 a condemnation and therefore their right of interest to
11 the land to this transaction.

12 In addition to that, the other representa-
13 tion, the officers and directors of the corporation,
14 and I presume an assistant vice president of the corpora-
15 tion itself, had no direct or indirect relationship
16 with Route 57-31 Development Corporation to whom land
17 was sold in the land sale contracts during the period.
18 If not direct, it is certainly an indirect relationship
19 which violates that specific representation also.

20 Q I would like to direct your attention, Mr.
21 Murray, to the Greater Gulf Coast Housing Development
22 Corporation contract and the recognition of income in
23 both the seven-month period ending February 28th and
24 as well as the July 31st period.

25 I ask you if you learned that the contract

1 jba

Murray-direct

3334

2 If you have one hand and one machine and there is a
3 difference, you would look to see what the recon-
4 ciliation is and investigate why there is a differ-
5 ence.

6 Q With respect to the collectability of the Raseac
7 receivable, which I believe you recall was specifically
8 mentioned in the September representation letter --

9 A Yes, sir.

10 Q -- if it were established that Mr. Yanowitch
11 in the first place had orally promised the principals
12 of that corporation that they would suffer no losses and
13 that if they were presented with problems a substitute buyer
14 were and would be found for them and that therefore
15 his former law partner did take over responsibility from
16 the principals of Raseac with a bank loan which was
17 to be paid out of increased legal fees, what would
18 the discovery of those facts and what would their
19 effect have been upon your opinion?

20 A About the only fact that might have
21 concerned me was the increased legal fees, whether these
22 things were in fact as a result of increased activities
23 or just inflated billings. If it was increased
24 activities, they got dollar for dollar. If it was
25 inflated billings, then you've got a question as to

jba

Murray-direct

3335

the arm's length nature of the transaction.

Q Who had originally rendered an opinion with respect to the recognition of income on the Raseac transaction?

A I believe it was Harris, Kerr, Forster. If this information were made known to Harris, Kerr, Forster I think that they may have taken a look at it. The only thing that I could think of that you would have done with respect to that would have been bring these -- if they came to my attention it would not have affected Peat, Marwick's opinion but it would have been something that would have been brought to the attention of the predecessor auditors Harris, Kerr, Forster, and I may not have signed that letter that said nothing that came to our attention, that we believe should be brought to your attention as a result of our subsequent work. We did issue that letter to Harris, Kerr. But what impact, what effect it would have had on their report, I frankly cannot say. I don't know.

Q Mr. Murray, in my office last night did you examine another copy of the chart which you see to your left on the blackboard?

A Yes. I think I saw a smaller edition of

ps5

Murray - cross

3394

1
2 Q Prior to the second stock offering, did you
3 hear about that Barron's article?

4 A Yes, sir.

5 Q Who did you discuss it with?

6 A I don't recall discussing that article with
7 anyone. I did have at Mr. Yanowitch's request some time
8 during the proceeding he asked me to call the writer for
9 Barron's. I don't recall the fellow's name. We had a
10 very brief telephone conversation with him, and I have
11 no recollection of that particular article that was in
12 question ever being published.

13 Q But am I correct that you did hear about
14 another article which was published?

15 A I heard about an article in Barron's, and I
16 read it at some time between the date of publication and
17 today. I'm really not sure at what point in time I
18 read it.

19 Q Did Mr. Schulz ever refuse to make an
20 adjustment that you or anybody else from Peat, Marwick
21 recommended?

22 A To my knowledge, no.

23 Q Did he ever put up much of a fight about any
24 particular recommendation?

25 A I don't know what you mean by much of a

1 hba8 Murray-cross

2 four months before the prospectus Peat, Marwick knew
3 about those \$1 million worth of reassignments?

4 A No, sir.

5 MR. EATON: I think it is a good time
6 for a break.

7 THE COURT: Let's take 10 minutes, ladies
8 and gentlemen.

9 (The jury left the courtroom.)

10 (The witness left the stand.)

11 THE COURT: I am sure you understand,
12 Mr. Eaton, that I would not have interrupted you on
13 my own motion but I had received word via Mr. Swan-
14 ciger that one of our jurors had to go to the bathroom
15 and I thought you might want to stop as soon as you
16 could to keep the attention of that juror.

17 We will take the recess, but let me briefly
18 use two or three minutes of this recess, since I am
19 sure none of you have to go to the bathroom, to pick
20 up on something we talked about earlier, namely, the
21 application for a severance.

22 Early in our work on this case I invited you to
23 tell me, defense counsel, whether you would some day
24 want me to marshal the evidence in some way. An applica-
25 tion for a severance revives that question and I want

1 hba9

2 to leave it with you, Mr. Mukasey. I am still not
3 disposed to summarize in any great detail the respective
4 situations of the individual defendants unless they
5 wish me to. That applies as of this moment to
6 Mr. Phillips as to any other.

7 On the other hand, I don't want you to feel
8 that you have waived any rights or that you are pre-
9 cluded by considerations of my convenience, so if you
10 decide that you want his assertedly unique situation
11 somehow highlighted in the instructions to the jury
12 I will carefully consider your desire and probably
13 grant it.

14 The position is I probably will state the
15 issues in very general and abstract terms, like the
16 necessity for considering each defendant individually
17 in terms of the evidence or lack of evidence against
18 him and leave it to each of you to put it in the
19 best light or to adopt Mr. Gaynor's phrase, to put the
20 best foot forward of your respective clients; but
21 if you want me to do something different you ought to
22 let me know and be specific about it. If you want a
23 particular kind of marshaling on behalf of your client
24 write it out, let me see it and let Mr. MacDonald see
25 it so we can all consider it in advance of the charge

1 hbal0

2 to the jury. Okay?

3 MR. MUKASEY: Okay.

4 THE COURT: If I don't hear from any of you
5 the situation remains as we stated it earlier.

6 MR. GAYNOR: Your Honor --

7 THE COURT: Yes.

8 MR. GAYNOR: -- there is presently pend-
9 ing a matter which I think may have to be resolved; at
10 least I don't think it has been. I think the govern-
11 men has an application pending before your Honor with
12 respect to cross examining my client David Stirling
13 about an alleged visit by a reporter up to the Avon
14 plant. I would ask your Honor if you recall that,
15 and I am opposing that request for them to cross examine.

16 THE COURT: I don't remember that question.
17 Has it been the subject of written submissions?

18 MR. GAYNOR: Yes.

19 MR. MAC DONALD: Yes, sir, and we won't
20 press the matter.

21 MR. GAYNOR: Okay, so that is withdrawn.

22 Okay.

23 MR. MAC DONALD: Is this a good time,
24 Judge, to discuss for a moment the reciprocal aspects
25 of the discovery of evidence and its employment in the

bs3

Murray - cross

1 is overstepping its boundaries and did not think
2 that Harris, Kerr or me understood the transactions.
3 (I got the impression that Mr. Murray took this
4 personally.)"

5
6 Q Mr. Murray, there came a point in time, did
7 there not, when there was a red herring, I trust, sir, you
8 know what I mean by a red herring?

9 A A preliminary prospectus, yes, sir.

10 Q Right. It is a preliminary prospectus.

11 MR. FELDSHUH: I would like to have it offered.

12 (Defendant Exhibit 759 was received in
13 evidence.)

xx 14 Q Now, sir, that meeting at Harris, Kerr dealt
15 in part with the land sale, did it not?

16 A Yes, sir, it did.

17 Q That was on April 19, 1971, prior to the date
18 of this preliminary prospectus?

19 A What is the date of that prospectus?

20 Q The date of the prospectus is April 21, 1971.

21 Now, sir, in connection with the preliminary
22 prospectus, certain filings had to be made with the SEC
23 as to which Peat, Marwick had to put its certification,
24 isn't that right?

25 A I am sorry, sir. Peat, Marwick did sign

bs4

Murray - cross

the accountant's report that is included in that registration statement that was filed.

Q Right. Now in that connection, it is the fact, is it not, that page -- addressing you to the note in sub-Paragraph B on page 27, sir, this is part of the section of the preliminary prospectus that deals with the accountant's report, is it not?

A No, sir, it is not.

(Continued on next page.)

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jps

Murray - cross

Q What part of the prospectus is that?

A Those are the notes of the financial statements of Stirling Homex Corporation.

Q Who reviewed the notes to financial statements?

A The board of directors, the auditors, the key financial employees of the company.

Q The auditors for whom?

A The auditors were Peat, Marwick & Mitchell for the period ending February 28, 1971 and for the period ending July 31, 1970 and prior, it was Harris, Kerr, Forster.

Q Now, sir, with regard to that preliminary prospectus, did you not read this page 27?

A Yes, sir, I did.

MR. FELDSHUH: If your Honor please, I would like to read this short footnote on the bottom of page 27, if I may, sir.

Ladies and gentlemen, this is a preliminary prospectus as issued by Stirling Homex. It is dated April 21, 1971. I am now reading from a footnote which commences on page 27 and it is Footnote Sub-Paragraph B:

"During the seven months ended February 28, 1971 a subsidiary of the company sold a parcel of land for an aggregate contract price of \$2,100,000.

ps2

\$1,822,723 was included in 'sales - trade'. And the balance of \$277,277 has been completed as imputed interest and will be recognized as income as it is earned during the payment period. The sale accounted for approximately 35 percent of the company's net income for the period. The contract provides for a \$210,000 payment which was paid and minimum semi-annual payments of \$25,000 each beginning June 30, 1971 to December 30, 1975 on which date the remaining balance is due. After December 30, 1972 interest will be payable on the unpaid balance at the rate of 4 percent. The contract provides that 10 acres of land subject thereto will be conveyed to the purchaser a corporation whose principal asset is its interest in the contract to allow the application for an institutional loan for construction in accordance with the proposed program of the purchaser for development of the property without any additional payment by the purchaser. And for the conveyance of additional portions of the land upon payment by the purchaser of \$18,585 for each acre conveyed. The minimum semi-annual payments are a credit against the release price for acreage.

"The contract provides for a credit against the purchase price consisting of a portion of the award to be received by the subsidiary in pending proceedings to determine the awards for the condemnation by the State of New York of certain land contiguous to the land with which is subject to the contract."

Q Sir, with regard to Exhibit 759 and insofar as this footnote which I have just read, the auditors of your firm, PMM, to wit, Mr. Horn and others, had access to this file, did they not, which was supportive of this Footnote B. isn't that so?

A To which file are you referring, Mr. Feldshuh?

Q Well, sir, can you identify this transaction as being -- can you not identify this transaction as being 57-31?

A Yes, sir.

Q Isn't that what it is?

A Yes.

Q Isn't it a fact, sir, that that file was available to the auditors of Peat, Marwick when they were examining records of Stirling Homex?

A -- I have no idea of that, Mr. Feldshuh. I saw certain documents. I don't know what was available to

ps4

Murray - cross

any others.

Q Sir, with regard to this situation and it being the subject matter of the discussion on April 19, 1971, which is just two days before this is dated, didn't you have occasion to look at the files before you went to the meeting?

A Well, perhaps you can help me there, Mr. Feldshuh

Q Did you have --

A Could you tell me what you mean by files? The Peat, Marwick working paper files? Yes, sir; I did.

Q Sir, with regard to the Peat, Marwick working paper files, it is important to have in that file, as you previously testified, all documents that are critical to a transaction, isn't that so?

A Not necessarily to have them in the files, Mr. Feldshuh. But to have reviewed them, examine them for the purpose of arriving at a decision.

Q So, it is fair to state that certain documents or the documents with relation to 57-31, as that transaction is recounted in this preliminary prospectus, were, at least, available to whomever wished to look at them from Peat, Marwick?

A There are documents that I did examine and were available to Peat, Marwick that cover the material

3716

1 ps5 Murray - cross

2 that's disclosed in that prospectus.

3 Q Now, sir, just one final thing.

4 In due course during the period that you were
5 the accountants, outside accountants for Stirling Homex,
6 an annual report was issued, was it not?

7 A Yes, sir.

8 Q Is that the annual report?

9 A This is the 1971 annual report of Stirling
10 Homex.

11 Q And that refers to a period ending July 31,
12 1971?

13 A Yes, sir.

14 Q And in connection with the preparation of the
15 financial section of this annual report, Peat, Marwick
16 was informed about the financial section, was it not?

17 A We rendered our opinion on those financial
18 statements.

19 Q That opinion forms a part of this report and
20 as incorporated therein?

21 A Yes, sir.

22 MR. FELDSHUH: I offer it.

23 MR. MacDONALD: No objection.

24 (Defendants' Exhibit 565 was received in
25 evidence.)

xx

1 jpal0

Murray-cross

2 Q It would be the paying agent, would it not,
3 who would decide whether it is payable or not?

4 A Whether it fell under the terms of the
5 contract.

6 Q Whether it fell under the terms of the con-
7 tract?

8 A Yes.

9 Q Is it also correct that as a result of this
10 confirmation, Exhibit 867, it was decided that that
11 \$832,000 item could not be taken into income at all?

12 A It was questioned by Mike Horn as
13 to whether this constituted an account receivable in con-
14 ventional terms of an account receivable. Based on
15 his further investigation, these costs, as was was
16 displayed to him and then subsequently to me, were
17 so-called soft costs in connection with the construction
18 of a plant. Soft costs being other than the bricks
19 and hardware and plumbing; the architectural fees,
20 the engineering fees, site selection, all of which
21 are properly capitalizable as a cost of building the
22 building. That investigation was triggered by the
23 receipt of this confirmation report.
24
25

COPY RECEIVED
JUN 6 1977
ROBERT B. FISKE JR.
SO. DIST. OF N. Y.